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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 516.

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NORFOLK & WESTERN RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

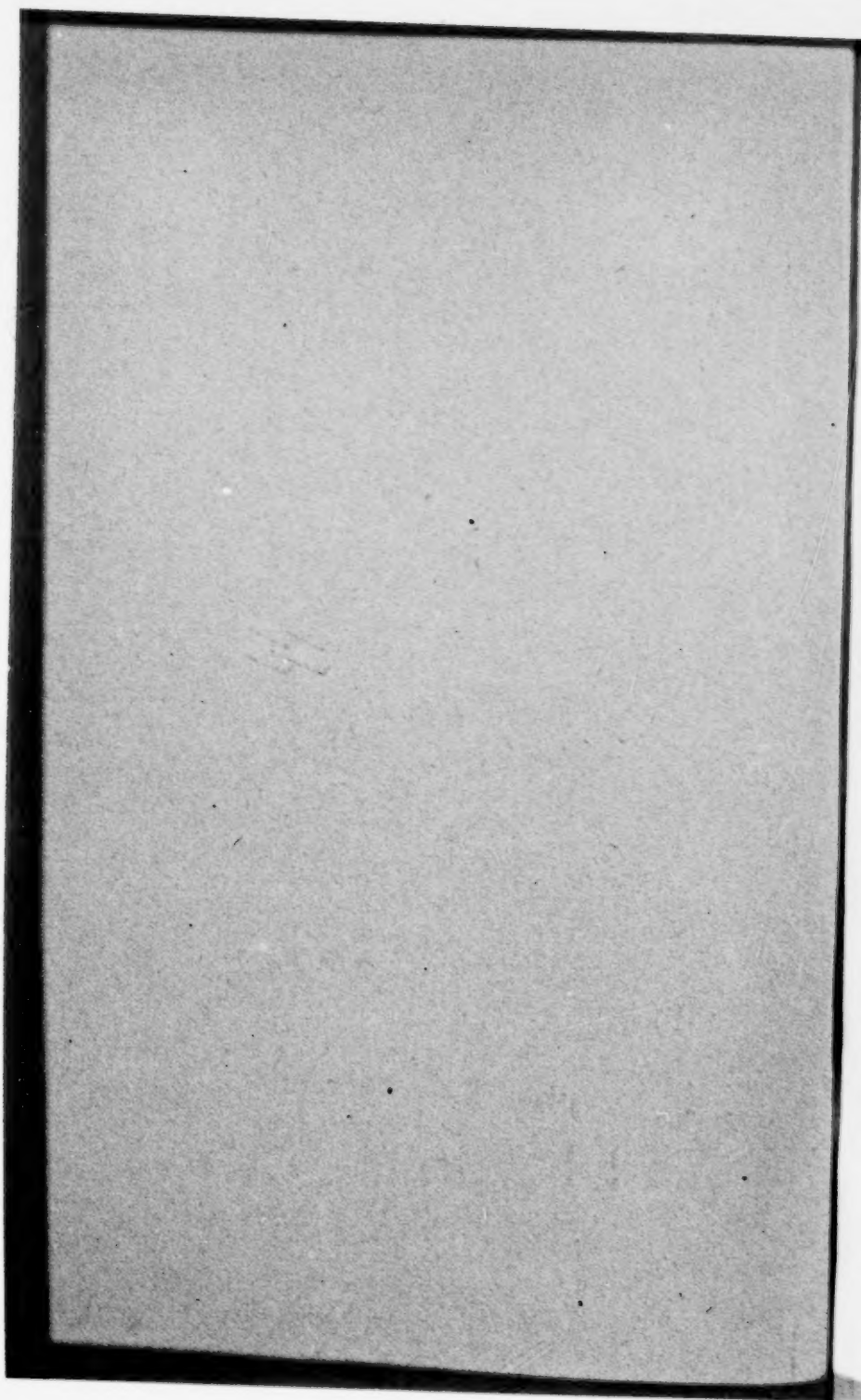
SARAH E. HOLBROOK, ADMINISTRATRIX OF W. T. HOL-  
BROOK, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT.

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FILED JUNE 5, 1914.

(24,258)





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*a* UNITED STATES OF AMERICA, *ss*:

At a United States Circuit Court of Appeals for the Fourth Circuit,  
Begun and Held at the Court House, in the City of Richmond,  
on the First Tuesday in May, Being the Fifth Day of the Same  
Month, in the Year of our Lord One Thousand Nine Hundred  
and Fourteen.

Present:

Hon. J. C. Pritchard, Circuit Judge.  
Hon. Martin A. Knapp, Circuit Judge.  
Hon. Charles A. Woods, Circuit Judge.

Among other were the following proceedings, to-wit:

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,  
versus  
SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Defendant in Error.

In Error to the District Court of the United States for the Western  
District of Virginia, at Roanoke.

Be it remembered that heretofore, to-wit: on November 19, 1913,  
the transcript of the record of the said District Court in the said  
entitled cause was transmitted to and filed in our said Circuit Court  
of Appeals here, which is as follows:

1 TRANSCRIPT OF RECORD.

Filed Nov. 19, 1913.

In the United States District Court for the Western District of  
Virginia, at Roanoke, Virginia.

SARAH E. HOLBROOK, Adm'r'x of W. T. Holbrook, Dec'd,  
vs.  
N. & W. RAILWAY CO.

*Stipulation of Counsel.*

It is agreed that the record to be certified to the Circuit Court of  
Appeals, on the writ of error allowed in this case, shall consist of  
the following:

Declaration and amended declaration.  
Order showing defendant's plea of not guilty.  
Bill of particulars of plaintiff's claim.  
Defendant's grounds of defense.

Verdict of the jury.

Judgment of the court.

All other orders entered in the case.

Defendant's bill of exceptions.

Memo. required by Rule 14, section 7, of the Rules of the C. C. A.

This stipulation.

Assignment of errors.

It is further stipulated and agreed that the clerk of this court shall transmit a transcript of the record as above agreed to the clerk of the C. C. A. for the Fourth Circuit at Richmond, to be printed in accordance with Rule 23 of the court.

(Signed)

McCORMICK & SMITH,

*Attorneys for Plaintiff in Error.*

(Signed)

WM. H. WERTH,

*Attorney for Def't in Error.*

This Oct. 28, 1913.

Filed October 28, 1913.

STANLEY W. MARTIN, *Clerk,*

By W. V. MARTIN, *Deputy Clerk.*

2 In the District Court of the United States for the Western  
District of Virginia, at Roanoke, Virginia.

SARAH E. HOLBROOK, Administratrix, etc., Plaintiff,  
versus

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

*Plaintiff's Declaration.*

First Count.

Sarah E. Holbrook, personal representative as administratrix of the estate of W. T. Holbrook, deceased, plaintiff (hereinafter called plaintiff), comes and complains of the Norfolk & Western Railway Company, defendant (a corporation, hereinafter called defendant), of a plea of trespass on the case, for this, to-wit:

(1) Plaintiff says, alleges and avers, as follows, to-wit: (a) That plaintiff is the duly appointed, qualified and bonded personal representative, as administratrix, of the estate of her intestate, W. T. Holbrook, deceased (hereinafter called intestate), in the manner and form and by the officers as required under and by virtue of the laws of the State of Virginia, in which said State said intestate had his domicile at the time of his death, and in which State said plaintiff was domiciled at the time of her appointment and is now domiciled; that plaintiff is the surviving widow of said intestate, and that said intestate also left surviving him, on January 4, 1913, the date of his death, children of himself and said surviving widow, whose names and ages are as follows, to-wit: Alton D. Holbrook, age 14 years; Eugena A., age 11 years; Bessie M., age 7; Alden V., age 4, and Pansey M. Holbrook, age 1 year, each of whom now survive said intestate.

(b) That on January 4, 1913, and for many years prior thereto, defendant was a common carrier by railroad engaged in commerce between the States, in this, to-wit, that defendant was at the time mentioned and is now engaged in the transportation of goods, wares and merchandise, and of passengers and of other traffic and commerce between the States, to-wit, between the States of Virginia and West Virginia and other States; that defendant's railroad tracks, upon which said interstate commerce and traffic was and is transported to and from said states and between the same, and without which said commerce and traffic could not have been or be so transported by defendant, extended from and to the city of — in the State of Virginia, and through said State into and through the State of West Virginia from and to the city of — in the latter State; that upon said track and tracks defendant daily operated its trains going east and west from its terminus in one of said States to and from its terminus in the other of said States, upon which said trains it transported and carried for hire every conceivable subject of interstate commerce and traffic.

(c) That at the time of intestate's death on January 4, 1913, and long prior thereto, intestate was and had been employed by defendant as its servant and employé for hire to perform certain duties for it in the prosecution of defendant's said business of a common carrier by railroad between said States; that said intestate's duties, work and labor to the performance of which he was assigned by defendant was working on or about the said tracks of defendant and on and about the bridges over which some portions of said tracks were laid, which said work, duties and labor were necessary in order to keep and maintain said tracks and bridges in a reasonably safe condition for the passage over them of said interstate trains of defendant while transporting said interstate passengers, freight and employes and necessary in order to prevent the delay, interruption and hindering of said interstate commerce between said States; that the branch of work to which said intestate was assigned as aforesaid was classified as that department of the business of defendant known and called Maintenance of Way; that the work in this department was divided up over defendant's system of interstate railroad into divisions; that the division to which intestate was assigned to work was known and called the Pocahontas division, which covered and embraced defendant's tracks and bridges from Bluefield, in the State of West Virginia, to Norton, in the State of Virginia, and from Bluefield, West Virginia, through a portion of the State of Virginia to Graham in said latter State, and from there to Williamson, in the State of West Virginia; that said Pocahontas division thus embraced the right of way of defendant and the tracks and bridges upon the same in said two States between the points named, and intestate's work, duties and labor were required by defendant and were performed by intestate at any and all points within said Pocahontas division when and where defendant demanded them within said division.

(d) That on the said day and year last mentioned and at the time just before the death of said intestate he was engaged in the perform-

4       ance of his said work, duties and labor, as defendant's employé as aforesaid, on said Pocahontas division, on a bridge at or near defendant's station or flag-stop known as Pando, in the State of West Virginia; that while and at the time he was so engaged upon said bridge, over and upon which said defendant's tracks were laid and put down, intestate was killed as the result of the negligence of defendant and of defendant's other employés then and there engaged with intestate in the work of and for defendant in its said business of a common carrier by railroad of interstate commerce and traffic, which said negligence consisted of the wrongful acts, neglects, defaults and omissions as hereinafter more particularly set out and alleged in this and the following counts of this declaration.

(c) That defendant corporation had its chief and principal office and its legal residence, and was doing business as a common carrier by railroad, in the Western Judicial District of the State of Virginia, at the time this action was commenced; that the amount involved in this action exceeds the sum of \$2,000, exclusive of interest and cost; that by virtue and force of an act of the Congress of the United States, approved April 22, 1908, and another act approved April 5, 1910, amendatory of said first act (which said two acts apply to and are hereby expressly invoked in behalf of the cause of action in this and the following counts of this declaration set out), the District Court of the United States for the Western District of Virginia has jurisdiction to hear and determine this action.

(2) Plaintiff further says, alleges and avers, that in the performance of his work, duties and labor as herein before set out her intestate was directed and required by defendant to become one of a gang or crew of other employés of defendant doing like kind of work, all of whom together numbered — to — men; that all these men, including intestate, were required and directed by defendant to work under the direct control, orders and supervision of a foreman employed by defendant and charged by it with the duty and given authority to so direct, control and supervise the work of said men, and to direct when and where said men were to work.

Plaintiff says that on January 4, 1913, the gang or crew of men, (commonly called "bridge men" or "Bridge Crew" or "bridge carpenters") of whom her intestate was one, was directed and ordered by their said foreman to go to work under his direct personal control and supervision, upon defendant's tracks running over and upon defendant's said bridge at or near Pando, W. Va., that defendant's said roadbed upon said bridge, and for a long distance east and west of the same, consisted of double tracks running about east and west; that the northern track was commonly and generally used for trains going west and the southern track for trains going east.

5       That over both tracks a large number of trains, going in both directions passed every day, and said trains consisted of both passenger and freight trains, and of regular schedule trains and "extra" and unscheduled trains; that regular scheduled trains were often running behind schedule time, and likewise often were run in two or more sections, in which case the front section would carry signals on its locomotive announcing that a rear section was to fol-



low; that a rear section is supposed to follow the train with said signals within — minutes, but that often such rear section would also be behind its schedule, in which case men at work on a bridge could not tell when it would arrive, without notice from a telegraph office.

(3) Plaintiff says that said bridge at Pando was only wide enough to give room for the two tracks and for trains to pass each other on said bridge; that when men were at work on same and a train came along they would have to get off the track and on to a floor beam in order to be out of danger from said train; that these floor beams were — feet apart so that were a man midway between them he would have to walk or run — feet before he could get in the clear from an approaching train; that the passenger trains going east and west over said bridge run very fast, to-wit, — miles per hour, and that the distance between said floor beams is such that unless men working on the bridge have some notice of the approach of a passenger train, they will be caught in a very dangerous position.

Plaintiff says that so many trains pass over these tracks going east and west daily, that it is a common occurrence for them to meet and pass each other, going in opposite directions on east and west bound tracks; that they are liable to so meet and pass at any place along said tracks and frequently meet and pass on the bridge at or near Pando.

Plaintiff says that very near to the west end of said bridge, to-wit; within — feet of the west end, there is a long tunnel, to-wit, a tunnel — feet long; that when trains run through and out of a tunnel, the operation of natural laws causes the train to draw a large part of the smoke accumulated in the tunnel from the passing locomotive, out of the tunnel in the direction of the train; that many of the freight trains operated by defendant over said tracks are what are called "double headers" that is, a train with two locomotive; that such trains create a much larger quantity of smoke in a tunnel than other trains; that where a tunnel is so near to a bridge as the one in question, a double header freight train going east will and always does draw and pull its smoke out upon the said bridge in such quantities as to obscure the vision of men working on the bridge for a considerable space of time after such a train has passed, and  
6 will obscure their vision to such an extent that they cannot see approaching trains, and the engineers of approaching trains cannot see the men on the bridge.

Plaintiff says that when bridge men such as intestate and the crew with whom he worked, are at work on a bridge, it is necessary and customary for them to have large number of tools and appliances, timbers and other materials and that it becomes necessary for them to have such tools, appliances and material scattered over the track. Plaintiff says that defendant had actual knowledge of each and every fact hereinbefore alleged and set out, and that defendant's foreman in charge of the crew of "bridge men" at the time and place herein before alleged (including intestate) had knowledge and notice of said facts.

(4) Plaintiff says that on the — day of — 1913, to-wit, on the 4th day of January, 1913, her intestate, together with several others of his crew of bridge carpenters, were ordered and directed by defendant's foreman to go to work on defendant's said bridge at or near Pando, W. Va., as before set out; that they were working on said bridge in the forenoon of said day, under the control, direction and supervision of said foreman, and were engaged in removing old and putting down new "guard rails" upon said bridge; that said guard rails were necessary to secure the reasonable safety of all the trains passing over and upon said bridge; that in order to do this work it was necessary at times to have tools, appliances, timbers, guard rails (old ones and new ones) and other material, lying upon said tracks; that in order for the men, including intestate, to do much work and perform their duties and labor properly, it was necessary for them to give their attention to their work; that during said forenoon of said day one of defendant's through passenger trains, (commonly known and called No. 15) going West, which was one of defendants' regular trains running through from the city of — in the State of Virginia, through the State of W. Va., to the city of — in the State of —, passed along over said bridge on the west bound track; that said No. 15 carried signals for a second section, which second section would be known and called section No. 15, and by the train's rules of defendant it was supposed and required to follow first No. 15 within — minutes, but on this day said second section was belated and behind time, and that it did not follow first No. 15 for a long space of time, to-wit: for the space of — hours. Plaintiff says that there was no telegraph station or operator at or near Pando; that said foreman did not know and had no means of telling how late second No. 15 would be, or when it would arrive and pass over said bridge. Plaintiff says that in the afternoon of said day, to-wit about the hour of 12:40 P. M., and while

7 said bridge men (including intestate) were busily engaged in putting in new guard rails on the northern side of said bridge, an east bound freight train, consisting of two locomotives and a long string of about — cars, emerged from the mouth of said tunnel near the west end of said bridge, and ran upon and over said bridge upon the east bound track; that the grade of the said track at this point is against trains going east, and that trains going east here pull up grade and trains going west are going down grade at this point.

Plaintiff says that said east bound train, being a freight, a double header, and consisting of a long string of cars, moving up grade, the locomotives and cars made a great noise, and in addition to the noise, said train, as the rear of it emerged from said tunnel, pulled and drew the smoke made by the two locomotives and accumulated in the tunnel, out of the tunnel and upon the bridge, so that plaintiff says both tracks on the bridge were enveloped in dense thick smoke to such an extent that the men on the bridge, including intestate, could not see an approaching train on the west bound track and the engineer of a west bound train approaching said bridge, could not see the men on the bridge.

Plaintiff says that at the time said freight train approached the bridge from the west said bridge men including intestate, were at work on the west bound track as before alleged, and they had one or more pieces of old guard rail lying on said west bound track, and were busily engaged and intent upon their work, which made it proper and necessary for them, including intestate, to be on the west bound track.

Plaintiff says that while a part of said freight train was still on the east bound track on the bridge, and while it was making the noise aforesaid, and while said bridge was so enveloped in smoke as alleged, and while intestate was on said west bound track in the regular performance of his duties, suddenly and without any timely warning, the second section of No. 15 ran upon the bridge going west on the west bound track at full speed and struck and collided with intestate, and then and there so injured him that said intestate then and there-to-wit, within about one hour after his injury, died as a result of the injury so received.

Plaintiff says that at the time said second section of No. 15 ran upon and over said bridge, there were a large number of said bridge men including the foreman upon said bridge, to-wit, at least the number of seven; that these men, including intestate, had been directed and ordered to go and to be upon that bridge and to work upon same at that time by said foreman, whose order and directions, they, and each of them including intestate, were  
8 required to obey by said defendant.

(5) Plaintiff says that notwithstanding said defendant and its said foreman had knowledge and notice of every fact hereinbefore set out and alleged which caused or contributed in bringing about the death of her intestate under the circumstances alleged, yet, no precautionary measures or steps were taken to protect the bridge men or intestate from the threatening danger or to make their place of work reasonably safe from passing trains.

Plaintiff says that said foreman knew that first No. 15 carried signals which announced that a second section would follow it and would go west on the west bound track and over that bridge; that he knew, when he ordered his men, including intestate, to return to work on the west bound track of the bridge after their dinner, that this second section had not passed and that it was liable to come along at full speed at any time while the men worked on said track and bridge; yet, plaintiff says that said foreman did not send a flagman east to give notice to the engineer of said approaching train; did not put down any torpedoes on the west bound track east of the bridge; did not send any watchman back east of the bridge, with whistle to blow or to make any other signal to warn the men on the bridge of the approach of the train; did not seek to ascertain by any means how late second No. 15 was or when it would arrive; and did nothing at all in any manner, shape, form or fashion, to protect the men on said bridge, busily engaged and intent on their work, from the danger of a sudden approach of said train without notice.

Plaintiff says that defendant did not give the engineer, or any

other employe of the train crew of second No. 15 either at the station from which said train started or at any telegraph office on its route or at any place or time before it reached the bridge in question, any notice or warning that men were at work on that bridge and might have the track thereon obstructed, or might be themselves endangered by the passage of that train over said bridge at full speed and without warning, or, if such notice or warning were given to said engineer, said engineer of said second section of No. 15 wholly ignored the same.

(6) And plaintiff says that by reason of the facts hereinbefore alleged and set out the death of her intestate and husband was caused by and resulted from the negligence of defendant's agents and employes, and was caused by and resulted from the insufficiency of intestate's place of work on said track and road bed, as a place of reasonable safety, which insufficiency was due to defendant's negligence in providing and maintaining its said tracks and road bed at the time and place mentioned and alleged, in such a condition as that they should be a reasonably safe place of work when its  
 9       servant and employe said intestate, was required to be on them in the regular discharge of his duties as defendant's employe.

And plaintiff says that by reason of the negligence aforesaid a cause of action hath accrued to her under and by virtue of the acts of Congress aforesaid.

#### Second Count.

And said plaintiff, further complaining of said defendant, in this the second count of this declaration, hereby adopts paragraphs, one, two, three and four of the first count of this declaration as and for paragraphs one, two, three and four of this second count to the extent as if each and all of each of said paragraphs were herein set out in full in the order named; and for further complaint in this count.

(5) Plaintiff says that the regular foreman of said gang, squad, or crew of bridge carpenters, of which her intestate was one, was not competent for the position of foreman; that said regular foreman was a man by the name of — Anderson, who was a cripple, in this, to-wit: that he only had one leg, having lost one of his legs, to-wit: his — leg; that by reason of this physical disability said regular foreman could not get about to do the work and perform the duties required of one in his position in order to secure the reasonable safety of the men working under him; that for this reason said regular foreman had been for a long time, to-wit: for the space of — months, in the habit of not going regularly out to work with his men as it was his duty to do, but of appointing one of his men, to-wit, one D. G. Garbaugh, in his room and place and delegating to said Carbaugh, his, said Anderson's duties and authority and making said Carbaugh acting foreman for defendant.

Plaintiff says that defendant had knowledge and notice that said *Anderson* was a cripple as alleged; that he was physically incapacitated

tated and unable to perform the duties of foreman in such a manner as to secure the reasonable safety of the men working under his orders and authority; that he was in the habit of sending his men out to work on bridges, including intestate, without going with them to perform those duties required of foreman by defendant, in order to secure the reasonable safety of the men under him; that he was in the habit of appointing said Carbaugh as acting foreman in his, said Anderson's place to perform for said Anderson the duties aforesaid.

Plaintiff says that at the time and place hereinbefore set out and alleged when and where her intestate was killed, said Carbaugh was in charge and authority over said bridge carpenters as acting foreman, substituted by said Anderson in his room and place  
10 to perform said Anderson's duties with reference to securing the reasonable safety of said bridge carpenters, including intestate, being so substituted by said Anderson for the reasons herein before set out and in pursuance of said Anderson's habit and because said Anderson was incompetent by reason of his said physical disability.

(6) Plaintiff says that said Carbaugh was incompetent and inexperienced for the position of foreman, in this, to-wit: that Carbaugh had never seen, read or been furnished and was unacquainted with the printed rules of said defendant made, printed and promulgated by said defendant with the intent and purpose to secure the reasonable safety of its employes while working on its tracks and bridges and applicable to the situation at the time and place when and where intestate was killed; said *said* Carbaugh had no intelligent appreciation of the dangers inherent in said situation and was wholly ignorant of the precautionary measures required of a foreman in view of that situation. And plaintiff says that said Anderson had notice and knowledge of said Carbaugh's inexperience, ignorance and incompetence as herein set out and that defendant had like knowledge and notice.

(7) And plaintiff says that by reason of said Anderson's physical disability, he substituted said Carbaugh in his place as foreman, and that by reason of the latter's said inexperience, ignorance and incompetency, with full knowledge of all the facts creating the dangerous situation as hereinbefore alleged and set out, said Carbaugh sent out no flag or flagman, no watchman or other person, with orders or instructions to go east of said bridge and flag or watch for second No. 15 and warn the trainmen of the men on the bridge or warn the bridge men of the approaching train; nor did said Carbaugh himself make any effort to make timely discovery of the approach of said train, or take any step whatsoever to guard against said peril; but plaintiff says, said Carbaugh directed, ordered and required said bridge men including intestate, to work on said bridge without any protection from said passenger train at the time and place in question.

(8) And plaintiff says that by reason of the premises the death of her intestate and husband was caused by and resulted from the negligence of defendant's agents and employes who were charged

with the duty of exercising due care in providing intestate with a competent foreman, and that by reason of said death so caused a cause of action hath accrued to her under and by virtue of the acts of the Congress aforesaid.

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## Third Count.

And said plaintiff, further complaining of the said defendant in this third count of her declaration, hereby adopts paragraphs one, two, three and four of the first count of this declaration as and for paragraphs one, two, three and four of this third count to the extent as if each and all of each of said paragraphs were herein set out in full in the order named, and for further complaint.

(5) Plaintiff says that defendant's tracks extended across and into more than two States, with innumerable branch lines connecting with its main lines; that defendant had hundreds of such foremen as the one in charge at the time and place set out and alleged; that these foremen were daily working on the various tracks and bridges of defendant with large gangs and squads of men engaged on said bridges as herein before alleged; that it was necessary for the proper carrying on of defendant's business of a common carrier by railroad of traffic and commerce between the States aforesaid, that the running of its interstate passenger, mail and freight trains should not be delayed or interrupted by the operations of the said foreman and their men engaged on the said bridges, and that the work of said foremen and men should be prosecuted in such a manner as to insure the reasonable safety of such men and of all such trains when the latter should pass along over and upon such a bridge. To this end plaintiff says that ordinary care made it imperative that defendant should have printed and promulgated explicit, specific, clear, definite and express rules for the government of its said foremen in the premises, and to see that every and each foreman or employe acting in that capacity at such times and places, have and be familiar with its rules in this regard. And particularly plaintiff says that due and ordinary care in the premises required that defendant should have had rules which flatly and specifically required that:

(a) Whenever foremen and their men were at work on a bridge over which a train might be expected to pass, and the time of arrival of such train was not certainly known by him, that he should protect said men by sending back a flagman or watchman with proper signals, and

(b) Engineers of all trains going towards bridges on which employes were working be notified of the particular bridge on which such men were working and that a "slow order" be given requiring that such trains approach all such bridges under control.

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Or, plaintiff says defendant should have had rules to like purport or effect, which would have required expressly and provided for timely notice to men so situated of the approach of any train which would endanger their lives.

(6) Plaintiff says that defendant had not printed or promulgated and at the time in question did not have any such rules or any rule



or rules of like effect; that the foreman in charge of the gang and squad of men including intestate, at the time and place in question, did not have, had never seen or read or been furnished with any such rule or rules; that as a result said defendant's foreman at the time and place in question was not required by the rule or rules of defendant to flag said section of passenger train No. 15, or to station any watchman or other person east of said bridge to warn said men of the approach of said train or to warn the engineer of said train of the dangerous situation of said men on the bridge; or to place any signal such as a torpedo or other device on the track east of said bridge to warn said engineer that men were on the bridge; but, on the contrary, plaintiff says that under the rules of said defendant, said foreman was permitted to do as he did do, and to proceed to direct said men, including intestate, to work on said bridge without any precautionary measures whatever for their protection being taken by said foreman.

(7) Plaintiff says that because defendant's agents and employes charged with the duty of exercising due and ordinary care to secure the reasonable safety of employes required by it to work on and upon its bridges, failed and neglected to make, print and promulgate any proper, adequate or sufficient rule or rules governing and declaring the duties of such foremen under such situations as that herein before alleged and set forth; and because said acting foreman Carbaugh had not seen, read or been furnished by defendant with any such rule or rules prior to the time he was made foreman, said Carbaugh done none of those things required by ordinary care as necessary precautionary steps in view of the situation herein before alleged, to protect said men on the bridge at the time and place in question; and because he was not so required to protect such men they and intestate were required by said Carbaugh to work upon said bridge at the time and place in question without any provision for their timely warning of the approach of said second section of No. 15, and the said train was allowed to run upon and over said bridge and against and upon intestate and inflict upon intestate the fatal injuries in the manner and way and time and place as herein before alleged and set out.

And plaintiff says that by reason of the premises, the death  
13 of her husband and intestate resulted directly from the negligence of the agents and employes of said defendant who were charged with the duty of making, printing and promulgating suitable, adequate and proper rules necessary to secure the reasonable safety of defendant's said bridgemen while in the performance of their duties, and that by reason of said negligence a cause of action hath accrued to plaintiff against said defendant under and by virtue of the acts of the Congress aforesaid.

#### Fourth Count.

And said plaintiff further complaining of said defendant in this fourth count, hereby adopts paragraph one, two, three and four of the first count of this declaration as and for paragraphs one, two, three and four of this fourth count to the extent as if each and all

of each of said paragraphs were herein again set out in full in the order named, and for further complaint of said defendant.

(5) Plaintiff says that it was the custom and usage of defendant's foreman of bridge carpenters, when working on or upon defendant's said bridges, or on or upon defendant's tracks over and upon such bridges, to protect such workmen while so engaged, from passing trains of defendant and especially to protect them against the sudden and unexpected arrival and passage over such bridges of trains known to be approaching such bridges at such times, when the time of arrival at such bridges was unknown to such foreman; and plaintiff says that it was the custom and usage of such foreman to give such protection against trains known or believed to be approaching, but the time of arrival of which was unknown, by sending out in the direction from which such train was expected, a flagman with proper instructions as to the distance he should go and the signals he should use, and require him to go in that direction that distance and station himself upon the track to watch for the approach of such train, and thereupon to signal the engineer of the train or to signal the men on the bridge or else to place a "slow order" signal against such a train. Plaintiff says that due and ordinary care to secure the reasonable safety of such bridge carpenters when so engaged in the performance of their work, duties and labors, and giving their whole attention to the same, required that such measures of precaution be taken by the foremen of such a gang or squad of men.

(6) Plaintiff says that at the time and place hereinbefore alleged defendant's foreman in charge of said workmen on the  
14 bridge as set out herein, had notice and knowledge that the second section of west bound passenger train No. 15 was approaching the bridge in question from the east on the day aforesaid, and that said train would arrive and pass over the west bound track upon said bridge at some time unknown to said foreman, but before said bridge men would have quit their work thereon; that said train, unless signaled and warned by orders of said foreman, would approach and run upon and over said west bound track on said bridge at full speed; that at any time an east bound freight train might emerge from said tunnel and pull its smoke out upon said bridge and obscure the sight and vision of the men thereon, as before set out, and that said passenger train might pass over said bridge while said smoke was overhanging the same and while the sight and vision of the men working thereon was so obscured.

(7) Yet, plaintiff says notwithstanding notice and knowledge on the part of said foreman of each and all of said facts, and notwithstanding the known custom and usage of all of defendant's foremen to take the precautionary measures and steps aforesaid to protect the lives of their men when so situated under like circumstances and conditions; said foreman, Carbaugh, at the time and place mentioned directed all of his gang and squad of bridge men, included intestate, to go upon said bridge and upon the west bound track of the same, before said second section of train No. 15 had passed, and while and when it was or should have been expected by said foreman to arrive at some unknown minute, and then and there to

proceed with their work, duties and labors as defendant's employes upon the bridge in question; and plaintiff says that said foreman, Carbaugh did not then and there, or afterwards, take any one of said precautionary steps or measures for the protection of said men on said bridge, required by the situation and by said custom and usage and by the rule, rules, orders, bulletin orders to all foreman, instructions, applicable to said situation; that said foreman, Carbaugh did not send a flagman, or a watchman to the east of said bridge, did not send any signals or torpedoes to be placed east of said bridge, and did not himself do or cause any member of his gang or squad to do anything whatsoever with the purpose or which would in fact warn the engineer of said approaching train of the situation of the men on the bridge, or give timely warning to the men on the bridge of the near approach of the train.

(8) Plaintiff says that by reason of the negligence of said foreman, Carbaugh in the premises at the time and place in question, said train ran suddenly and unexpectedly upon said bridge and then and there ran upon and against said intestate while  
15 he was then and there engaged in his duties as defendant's employe upon said west bound track upon said bridge, and then and there inflicted mortal injury upon said intestate of which injury he there died, as before alleged; and by reason of the premises plaintiff says intestate's death resulted from the negligence of defendant's agents and employes, whereby a cause of action hath accrued to plaintiff under said acts.

(9) Plaintiff says that by reason of the premises set forth and alleged in the first, second, third and fourth counts of this declaration, she hath been damaged in the sum of forty thousand dollars, (\$40,000.00), and therefore she brings her suite.

SARAH E. HOLBROOK,

*Administratrix of Wm. T. Holbrook, Deceased,*

By WM. H. WERTH, *Attorney.*

WM. H. WERTH,

*Attorney for Plaintiff.*

In the United States District Court for the Western District of Virginia, at Roanoke.

SARAH E. HOLBROOK, Admx., etc., Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

*Amended Declaration.*

Sarah E. Holbrook, personal representative as Administratrix of W. T. Holbrook, deceased, plaintiff, comes and by way of further complaint of the Norfolk & Western Railway Company, a corporation (hereinafter called defendant), files this as her amended declaration, and by way of amendment and addition to her said original declaration, said plaintiff adds the following fifth count to her said original declaration to-wit:

## Fifth Count.

And said plaintiff, further complaining of said defendant in this the fifth count of her declaration, hereby adopts paragraphs one, two, three, four and five of the first count of her original declaration as and for paragraphs one, two, three, four and five of this fifth count to the extent as if each and all of each of said paragraphs of said first count were here again set out in full in the order named; and for further complaint of defendant in this count.

16 (6) Plaintiff says, that the squad, crew, or gang of bridge men, or carpenters, employed by defendant as aforesaid and working for it under the supervision of Foreman Carbaugh, of whom her intestate was one, usually, generally and customarily consisted of the number of from — to — men, to-wit, from about 12 to 18 men; that at least this number of men were reasonably necessary for the proper conduct and performance of the work and duties imposed upon the said gang, crew, or squad of men.

(7) Plaintiff says that at the time and place in question, when and where said foreman was working on the bridge in question, the rules, orders, instructions and regulations of said defendant then and there in force and applicable to the situation herein before described, as well as the general custom and usage of defendant's foremen when conducting and supervising such work on such a bridge under the circumstances set out, both required that said foreman should have protected said men while at work by sending a flagman out with a flag in both directions to warn or stop all trains approaching said bridge from the east or west, and plaintiff says that ordinary care under the circumstances required also that said flagmen be sent out as aforesaid.

(8) Plaintiff says that at the time and place in question, when and where said men were working on the track on said bridge, defendant did not have the usual, customary or necessary number of men at work on this squad, or crew of men; that defendant only had the number of — men, to-wit, the number of six, men, which was less than one-half the usual, customary and reasonably necessary number in order to do the work in hand properly, or as it was usually done, or with reasonable care; plaintiff says that it would have required at least two men to act as flagmen to give reasonable protection to the men at work on the bridge at the time and place in question from trains which were to be expected and did pass over said bridge from the east and west while the men were at work thereon; plaintiff says that said foreman did not send out these two flagmen, or any flagman, to flag trains either from the east or west, and that the reason he did not was because to have done so would have so reduced the number of men under him that he would no longer have had help and force enough to have prosecuted and conducted the work in hand with that expedition or efficiency which was necessary and desired; and plaintiff says that because no flagman was sent out to the east, said second  $\approx$  15 was unflagged and ran upon said bridge and killed intestate as alleged.

17 (9) Plaintiff says that by reason of the premises set out in the first, second, third and fourth counts of her original

declaration, and in this her amended declaration, she hath been greatly damaged, to-wit, in the sum of Forty Thousand Dollars (\$40,000.00), and that by reason whereof a cause of action hath accrued to her under the said Act of the Congress and the Act amendatory thereof to maintain this action in this court and therefore she brings her suite.

SARAH E. HOLBROOK,  
*Administratrix of W. T. Holbrook, Deceased,*  
(Signed) By WILLIAM H. WERTH,  
*Her Attorney.*

WILLIAM H. WERTH, *p. q.*

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 18th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

SARAH E. HOLBROOK, Admx., etc., Plaintiff,  
vs.  
NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

Trespass on the Case.

This June 18th, 1913, came Defendant, Norfolk & Western Railway Company, by its counsel, and filed its demurrer to Plaintiff's declaration and each count thereof, and the grounds thereof in writing in which demurrer plaintiff joined.

Whereupon, said demurrer having been argued by counsel and considered by the Court, it is considered that the same be and is hereby overruled.

Thereupon, defendant pleaded not guilty to plaintiff's declaration and each count thereof, to which plea plaintiff replied generally. Thereupon plaintiff moved the court to require defendant to file in writing the grounds of its defense and defendant moved the court to require plaintiff to file in writing the particulars of her claim, each of which motions the court sustained, and both of which were thereupon complied with by defendant and plaintiff, respectively.

18 In the District Court of the United States at Roanoke,  
Virginia, June, 1913.

SARAH E. HOLBROOK, Admrx., etc., Plaintiff,  
versus  
NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

*Particulars of the Plaintiff's Claim.*

Plaintiff states the following particulars of her claim in this case against the defendant, to-wit:

**First.**

That defendant and plaintiff's intestate at the time and place in question occupied a relation to each other which brought both within the terms of the Act of Congress invoked in the declaration.

**Second.**

That, at the time and place in question, under the facts, circumstances and conditions surrounding intestate and his place of work, it was required by reasonable and ordinary care, the custom and usage of defendant's foremen, and the rules, regulations, instructions & orders of defendant, that intestate and his co-workers should have been protected while at work on the bridge, from the danger of the sudden and unexpected approach of trains at full speed, by either timely warning to the men on the bridge, or timely warning to the engineers of approaching trains.

**Third.**

That the "timely warning" above referred to should have been provided for by defendant through its foreman in charge of the men on the bridge and through the engineers on its trains expected to pass over said bridge.

**Fourth.**

That the officers, agents and employees of defendant, who were charged with the duty of

- a. Providing generally for such timely warning, and
  - b. Executing and carrying out such provisions, as required by the facts, circumstances and conditions, wholly neglected and
- 19 failed to perform and discharge the same, and also performed the same in a negligent manner.

**Fifth.**

That the neglect, failure, negligence and omission of defendant and its officers, agents and employees consisted in this:

- a. Failure to use due care to protect employees on bridge 899a.
- b. Failure to anticipate situation reasonably to be expected.



- c. Failure to see that foreman knew rules applicable.
- d. Failure to have competent foreman in charge.
- e. Failure to have sufficient force of men to work and flag.
- f. Failure to have explicit rules for such situation & place.
- g. Failure to have any rules for such a situation.
- h. Failure of foreman to follow custom applicable to situation.
- i. Failure of foreman to discover signals on regular train #15.
- j. Failure of those charged with notice and duty to obey rules in book of rules issued Dec. 1, 1905, to-wit, the following:

Rule, 600.

Rule, 602.

Rule, 606.

Rule, 613.

Rule, 616.

Rule, 617.

- k. Failure of those charged with notice and duty to obey following special rules and instructions entitled "Rules for the Government of Employees Working on or about Tracks," issued September 1, 1910, by N. D. Maher, 2nd Vice-President and General Manager of defendant; to-wit:

Special Rule, 6.

Special Rule, 7.

Special Rule, 8.

Special Rule, 12.

#### Sixth.

For further and additional particulars of her claim against the defendant in this case, plaintiff relies

- a. Upon all the matters and things, facts, circumstances and conditions set forth and alleged in the First, Second, Third, 20 Fourth and Fifth Counts of her declaration, and also upon such other facts, circumstances and conditions of which defendant had knowledge or notice, or of which it ought, by the exercise of due care, to have such knowledge or notice; and,

- b. Upon such other facts, circumstances or conditions (now unknown to plaintiff by reason of her ignorance of the operation of railroads) as may be developed in the evidence and be material to the issues involved.

SARAH E. HOLBROOK,

*Administratrix, etc.,*

By COUNSEL.

(Signed) WM. H. WERTH, *p. q.*

United States Court for Western District of Virginia, at Roanoke.

SARAH E. HOLBROOK, Admx., Plaintiff,

v.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

*Grounds of Defense.*

1st. The defendant will claim the right to prove, under its plea of not guilty, everything ordinarily and usually provable under that plea.

2nd. That it was guilty of no negligence in the running and operation of said train which is alleged to have caused the death of the plaintiff's intestate. It had a right to run its trains in two sections.

3rd. That the plaintiff's intestate was guilty of negligence himself in that he not only had the opportunity and the chance to get out of the way of the train which struck him, but that he had actually gotten out of the way, and came back upon the track without any reason or necessity.

4th. That none of the duties, if they may be so called, alleged in the first, second, third, fourth and fifth counts of the declaration rested upon the defendant company, and there was no breach of any duty at all as alleged in any one of these counts even if such duty can be held to have been alleged.

5th. The defendant will deny each and every allegation of fact made in the plaintiff's declaration and each count thereof.

6th. The defendant will claim that while it did not send out a flagman it gave to the plaintiff proper instructions and due, sufficient and timely warning. It will further claim that it was not necessary nor its duty to send out a flagman.

21 7th. The defendant will rely upon the defense of assumption of risk, claiming that the plaintiff assumed all the risks ordinarily incident to his employment, and that his injury was the result of one of those risks so assumed by him.

NORFOLK & WESTERN RAILWAY COMPANY,  
By COUNSEL.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 21st Day of June, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day came the plaintiff and defendant by counsel and came also the following jury to-wit:

1. W. R. Argenbright, 2. James Brown, 3. Robert W. Camper, 4. J. P. Effinger, 5. Mark F. Green, 6. H. F. Scott, 7. R. L. Terry, 8. N. A. Forbes, 9. A. L. Feathers, 10. Jno. W. Hylton, 11. W. J. Kropff, 12. W. P. Martin, who being selected, tried and sworn to well and truly try the issue joined, and having heard part of the evidence, were adjourned until 9.30 A. M. Monday, June 23, 1913, to which time this case is continued.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roakone, within and for said District, on the 23rd Day of June, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day came against the plaintiff and defendant by counsel and the jury heretofore sworn in this case, and having further heard the evidence, the jury were adjourned until 9.30 A. M. tomorrow, to which time this case is continued.

22 At a regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 24th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day again came the plaintiff and defendant by counsel, and the jury heretofore sworn in this case, and having further heard the evidence, were adjourned until 9.30 A. M. tomorrow morning, to which time this case is continued.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 25th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day again came the plaintiff and defendant by counsel, and the jury heretofore sworn in this case, and having further heard the evidence, were adjourned until 9:30 A. M. tomorrow morning, to which time this case is continued.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 26th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day again came the plaintiff and defendant by counsel, and the jury heretofore sworn in this case, viz:

23      1. W. R. Argenbright, 2. James Brown, 3. Robert W. Camper, 4. J. P. Effinger, 5. Mark F. Green, 6. H. F. Scott, 7. R. L. Terry, 8. N. A. Forbes, 9. A. L. Feathers, 10. W. J. Kropff, 11. W. P. Martin, 12. John W. Hilton, and the evidence having been heard in full, and having heard the instructions of the court and arguments of counsel, were adjourned until 9:30 A. M. tomorrow, to which time this case is continued.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 27th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day again came the plaintiff and defendant by counsel, and, with the consent of counsel, it was ordered that the juror, John W. Hylton, be excused from further service on account of a death in his family.

And came also the jury:

1. W. R. Argenbright, 2. James Brown, 3. Robert W. Camper, 4. J. P. Ellinger, 5. Mark F. Green, 6. H. F. Scott, 7. R. L. Terry, 8. N. A. Forbes, 9. A. L. Feathers, 10. W. J. Kropff, 11. W. P. Martin, who, having received further instructions from the court, retired to their room to consult of their verdict, and after some time returned into court and presented the following verdict:

"We the jury find for the plaintiff the sum of Twenty-five Thousand Dollars, \$25,000.00.

"A. L. FEATHERS, *Foreman*."

And thereupon the defendant moved the court to set aside the verdict and grant a new trial, and the court took said motion under advisement.

24 At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 18th Day of August, 1913.

Hon. Henry C. McDowell, Judge.

29. Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK & WESTERN RAILWAY COMPANY, Defendant.

This day came again the parties by their attorneys and defendant's motion that the verdict returned at a former day of this term be set aside and a new trial granted having been considered, it is, for reasons reduced to writing and filed, ordered that said motion be

and it is hereby overruled. And it is therefore considered by the court that the plaintiff recover of the defendant the sum of twenty-five thousand (\$25,000) dollars, with interest thereon at the rate of 6% per annum from June 27, 1913, until paid, and her costs in this behalf expended. And to this ruling the defendant excepts.

And whereas defendant feels aggrieved by the foregoing order and will probably sue out a writ of error, and whereas the court is of opinion that a proper understanding of the questions involved so require, it is ordered that any bill or bills of exception embodying the evidence for the plaintiff (including all objections and rulings) shall literally follow and copy the stenographic report thereof, and that the remainder of the evidence be not further condensed than as will result from merely changing it into narrative form. It is further ordered that in said bill or bills of exceptions the rulings of the court and the reasons, if any, given therefor be included in full.

In the United States District Court for the Western District of Virginia, Continued and Held at Roanoke, on October 14, 1913.

SARAH E. HOLBROOK, Adm'x,

v.

NORFOLK & WESTERN RAILWAY CO.

This day again came the parties by their attorneys and the plaintiff by counsel moved the court to so amend the order made in this cause on August 30, 1913, as to direct that the testimony  
25 of J. J. Hinkle, R. L. Porter and D. G. Carbaugh be embodied in the bill of exceptions verbatim as reported by the stenographer; and thereupon the defendant by counsel moved the court to further so modify said order as to direct that the testimony of the other witnesses for the defendant, except Geo. A. Smith and R. C. Weller, be embodied in the bill of exceptions verbatim as reported by the stenographer; and upon consideration of said motions, the court being of opinion that a proper understanding of the questions involved make it advisable, even if not absolutely necessary, that said motions be granted, it is so ordered.

It is further ordered that the photographs, train schedules and blue prints offered in evidence be certified to the Circuit Court of Appeals.



In the District Court of the United States for the Western District of Virginia.

At Law.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, Defendant.

*Defendant's Bill of Exceptions.*

Be it remembered that upon the trial of this cause the plaintiff and defendants, to maintain the issues upon their respective parts, introduced the following evidence in the order hereinafter set forth and which is (except as to the testimony of Geo. A. Smith, H. C. Weller, which is set forth in condensed and narrative form) in words and figures as follows:

(Here insert all the evidence beginning with the words "And the plaintiff," on page 8 and concluding with the end of the testimony for both plaintiff and defendant on page 531.)

And the plaintiff to further sustain the issue joined upon her part, introduced the following evidence in chief:

Plaintiff offers in evidence the paper marked for identification, "Stipulations by Defendant."

26 *"Stipulations by Defendant."*

SARAH E. HOLBROOK, Adm'x, Plaintiff,

vs.

NORFOLK & WESTERN RAILROAD CO., Def.

Trespass on the Case.

It is agreed by defendant in this action as follows:

(A) That defendant is a common carrier by railroad engaged in commerce between the states and was so engaged January 4, 1913.

(B) That the double track on the bridge involved in this case is a main track extending through and between different states.

(C) That said tracks and the bridge, No. 899 A mentioned in the declaration, upon and over which said tracks are laid, are daily used and are necessary in the prosecution and carrying on of said defendant's business of a common carrier by railroad of commerce between the states and that said defendant's passenger, freight and mail trains, carrying interstate passengers, freight and mail daily move over and upon said bridge going east and west, and could not be so moved without said bridge.

(Signed)

McCORMICK & SMITH,

*For the N. & W. Rwy. Co.*

A. L. HARRISON, for Plaintiff.

## Direct examination.

By Mr. WERTH:

Q. Mr. Harrison, have you been sworn?

A. Yes, sir.

Q. Where do you live, or where is your home?

A. Lebanon, Va.

Q. What county is that in?

A. In the county of Russell.

Q. How long has that been your home?

A. I was born and raised in Russell county.

Q. How far from Lebanon?

A. Two miles.

Q. Are you well known there, or otherwise?

A. Well, I have been raised in that county, beyond Lebanon.

Q. Did you give a statement to counsel for plaintiff in this case of the facts so far as you knew them, with reference to the accident in which W. T. Holbrook was killed?

A. Yes, sir.

27 Q. Did you give a similar statement to counsel or special agent representing the Norfolk & Western Railway Company?

Defendant's Objection.—Counsel for defendant object to the question because irrelevant and immaterial and improper.

Counsel for plaintiff says he wishes to show that the witness has been fair to both sides by giving a statement to both sides.

Objection sustained.

Q. Did you give a statement to a representative of the Norfolk & Western Railway Company a week or ten day's ago?

Defendant's Objection.—Counsel for defendant object to the question, and say that it is the very same question, an objection to which the court just sustained.

Counsel for plaintiff states that he thought the objection was overruled.

Q. Were you at or near Pando, on Bridge 899-A, January 4, 1913, when Tom Holbrook was killed?

A. I was on the bridge when Tom Holbrook was killed. I don't remember the date, but it was at Pando.

Q. I will ask you to tell the jury, briefly, how Mr. Holbrook came to be killed there?

A. Well, I don't know that I could tell you how he came to be killed.

Q. Well, tell us all you saw with reference to the circumstances just preceding his death?

A. I did not see him get killed.

Q. I know it. What were you doing on the bridge?

A. I was putting in guard rail bolts.

Q. What was Tom Holbrook doing?

A. I don't know what he was doing.

Q. I mean, what business was he engaged in at that time? I do

not mean just at the instant he was struck, but what was his occupation on that bridge?

A. I don't know what he was working at. They were putting a guard rail on the bridge at the time.

Q. Give me a list of the men who were engaged on that bridge force?

A. On the bridge at that time?

Q. Yes, who worked regularly on the bridge force; who were they?

28 A. They were John Henkle, Bill Henkle, Pierce Walters, Bob Porter, Tom Holbrook and myself, and the foreman, were all that were there at that time.

Q. Tom Holbrook, whom you have stated, worked regularly on the force, was he the same W. T. Holbrook who was killed there that day?

A. Yes, sir.

Q. How long had you worked on that force?

A. About five months, up until that time.

Q. Do you know how long Mr. Holbrook had worked on it?

A. No, sir, I do not.

Q. What was that force called?

A. (A pause without response.)

Q. What was that force called? What do you call your occupation?

A. Bridge force.

Q. What were the members of the force called?

A. Bridge carpenters.

Q. What foreman did you work under, and were you working under on January 4, 1913?

A. I was working on C. W. Anderson's force, but working under Mr. Carbaugh on the fourth of January.

Q. Who was C. W. Anderson? What connection did he have with the force?

A. It was C. W. Anderson's force.

Q. Why do you call it C. W. Anderson's force? What was his relation to the force; was he working as bridge carpenter foreman, or what?

A. He was foreman of the gang.

Q. Well, that is what I wanted to know. Why did Mr. Clabaugh happen to be foreman on the day I refer to instead of C. W. Anderson?

A. He was assistant foreman.

Q. How long had Mr. Carbaugh been assistant foreman prior to January fourth?

A. I don't know.

Q. During the time you had been working on that force, which you have stated was about nine months, who was generally in charge of the force; I mean Mr. Anderson, who you say was foreman, or Mr. Carbaugh, who you say was assistant foreman?

A. Mr. Carbaugh was generally in charge of the men out at work.

Q. What was the reason for that, if any?

A. I don't know.

Q. Was Mr. Anderson incapacitated in any way for doing work, or discharging his duties as foreman?

A. I did not understand the question.

Q. I will ask the stenographer to read it to us. (Which is done), I mean by that, was he physically disabled in any way?

A. He seemed to be sick at that time. I did not see him at all while he was off.

Q. Was Mr. Anderson a one-legged man or a two-legged man?

A. He seemed to be a one-legged man.

29 Q. Did you ever see him?

A. No, sir.

Q. Did you ever see him at all, in your life?

A. Mr. Anderson.

Q. Yes.

A. Yes, sir.

Q. Well, I am asking you was he a one-legged man or a two-legged man? You said he was said to be a one-legged man; do you know anything about it, whether he was or not?

A. I never did see his leg to know whether he was a one-legged man, or not

Q. Can't you tell by looking at a man so as to know whether he is a one-legged man, or not, whether he has a peg leg, or not?

A. I couldn't tell, but he walks crippled.

Q. During the five months you were working on that force, who generally had charge of it, Mr. Carbaugh, or Mr. Anderson?

A. Mr. Carbaugh was in charge of the men most of the time.

Q. When they went out to work on the bridges, who would go, Mr. Carbaugh or Mr. Anderson?

A. Mr. Carbaugh.

Q. Mr. Carbaugh, you say, was assistant foreman on this occasion when Mr. Holbrook was killed?

A. Yes, sir.

Q. What was the date, if you know, on which Mr. Holbrook was killed?

A. The Fourth of January.

Q. Last?

A. Last, yes, sir.

Q. What time did you go to work that morning?

A. Seven o'clock.

Q. By whose direction did you go to any given place of work rather than another?

A. (A pause without response.)

Q. I will ask the stenographer to read the question? (Which is done.)

A. Carbaugh.

Q. How did you happen to go to work on January 4th on Bridge 899-a; who told you to go there?

A. By instructions from the foreman, Carbaugh.

Q. What kind of work did you proceed to do on that bridge on that day?

A. Putting on guard rails.

Q. What do you mean by guard rails, what is a guard rail?

A. A guard rail is six by eight inches, wood, that is put on the outside along near the ends of the ties.

Q. Please explain to the jury how a guard rail is put down?

A. A guard rail is six by eight, and is sized down to five inches, with gaps in them to go down over the ties, and they are bolted down.

The COURT: How long are the pieces usually?

WITNESS: I don't remember just how long.

The COURT: Oh, I mean, just about the length.

30 WITNESS: About eighteen or twenty feet.

Q. You say they are bolted down through the ties. How are they bolted to the ties?

A. They are placed down on the ties, and holes bored down through the guard rails, and through the ties, and a bolt put in there.

Q. What holds that bolt in there; what fastens and holds it in there?

A. It has a nut on the bottom of it that tightens up, or tightens down and holds it.

Q. Is the nut on the bottom or top of the bolt?

A. On the bottom.

Q. What is on the top?

A. The head of the bolt.

Q. The nut is screwed on the end of the bolt at the bottom, is it?

A. Yes, sir.

Q. About how long was that bolt?

A. Some of them are fifteen and some are seventeen.

Q. What is the object of putting that guard rail on that bridge?

A. To hold the ties in place.

Q. After that guard rail is bolted down all the way across the bridge, what effect does it have on keeping the ties in place?

A. Every tie is in a gap, and the timber between the ties holds them from spreading or running together.

Q. Have you seen many bridges of the Norfolk & Western and other railroads.

A. I have seen a good many bridges.

Q. State whether or not all such guard rails as you have described are generally put on all bridges, or if they are just occasionally put on some bridges?

A. Such as what I have described, in what work I have done they generally used the kind I have described.

Q. I mean do all bridges have guard rails on them?

A. All bridges that I have ever noticed on the main line have guard rails.

Q. That is what I am talking about, on the main line. Have you worked on other railroads than the Norfolk & Western?

A. Yes, sir.

Q. What other railroads?

A. I worked on the Virginia & Southwestern division of the Southern Railway and the C. C. & O.

Q. Do the bridges on those railroads have guard rails similar to those you have described?

Defendant's Objection.—Counsel for defendant object to the question as immaterial and irrelevant.

Counsel for plaintiff replies that the stipulation by defendant already covers that and that he will not insist upon an answer.

31 Q. Coming back to the bridge involved in this case, how many men were engaged in putting down guard rails on this occasion, exclusive of Mr. Carbaugh, the foreman?

A. I don't know. I didn't notice as to how many were engaged in putting the guard rail down.

Q. I mean by my question to ask, how many men were at work on that bridge?

A. Six men, or seven with Mr. Carbaugh, the foreman.

Q. Would the different men be doing different parts of the work?

A. Well, I did not pay any particular attention to what they were working at.

Q. What did you do?

A. I put in bolts.

Q. Who took the bolts out?

A. I don't know.

Q. How would you take up an old guard rail in order to put down a new one?

A. Take the bolts out of it and lift it up.

Q. How would you go about taking the bolts out of it?

A. I would first take the nuts off of the bolts and pull the bolts.

Q. What would be your position when you went to take the nuts off? Show the jury row you would do it. The nuts would be under the cross ties, under the track, would they not?

A. Yes, sir.

Q. How would you get those nuts off?

A. Well, in different ways?

Q. How was it done there that day?

A. I don't know.

Q. Didn't you take any of them off?

A. No, sir.

Q. Well, did you see any of them being taken off?

A. No, sir.

Q. How were the nuts in the new guard rails screwed back down?

A. I stood on the flange of the floor beam and put the nuts on where they were called for, and way out near the middle of the span the bolts were cut off and driven down. They were not driven into the tie, but drifted down; in other words, we bored through the guard rail and they were driven into the tie.

Q. How long did you work on that bridge, January fourth from seven o'clock to the time you quit work on it?

A. I don't know just exactly the time when I quit.

Q. Did you do any work after Holbrook was killed?

A. No sir, I did not.

Q. Did the other men do any?

A. I don't know.

Q. Do you know whether they quit work when Holbrook was killed, or not?

A. No, sir; I went to Davy.

Q. Did you leave the other men there?

A. Yes, sir.

Q. Up to the time when you quit and left and went to Davy how many trains had passed over that bridge that day?

A. I don't know.

32 Q. Can't you give me an idea?

A. No, sir; I couldn't give you any idea as to how many had passed over it.

Q. Were there as many as one?

A. Yes, some several had passed.

Q. Well, that is what I wanted to get at. I asked you to give the jury an idea, and I now ask you to give the jury an idea of just how many you would say had passed over that bridge during the time you worked there on that day?

A. I had not paid any attention to the trains, as to how many had passed, so that I could not give you any idea.

Q. How many do you mean by "several"?

A. Well, I had noticed trains passing along all day.

Q. Was that a single track or double track?

A. Double track.

Q. What were the tracks called with reference to the direction in which the trains traveled?

A. East and west-bound tracks.

Q. What was the situation surrounding that bridge on the west end?

A. There was a tunnel.

Q. How far was the tunnel from the west end of the bridge, about?

A. I don't know; I never did measure it.

Q. Haven't you got some idea of it?

A. (A pause without response.)

Q. Well, it is a fact in this case, by counsel's statement to the jury, that it is about forty-one feet. State what sort of track it is west of the bridge and to the tunnel, with reference to being straight or a curve?

A. It is a curve.

Q. What sort of track is it east of the bridge, with reference to being straight or a curve?

A. It is a curve some little distance away from the bridge.

Q. How great distance do you mean? You say "some little."

A. I don't know exactly how far.

Q. What sort of curve is it? Is it much of curve, considerable of a curve, or what?

A. It is in an ordinary curve.



Q. Was there any obstruction there at that curve in the way of an embankment, or is the country level on the side of the right of way?

A. It is a cut.

Q. It is a cut?

A. Yes, sir.

Q. How would you go about framing those guard rails in order to get them ready to put down—new guard rails, I mean, to put down on the cross ties?

A. First you lay it down on the ties and make a mark for every tie. You then put it up on blocks and saw and adz out the gaps.

Q. Where would you put the new guard rails in order to mortise the gaps in it? Where would you take it to do that?

33 A. Take it up on the bridge and the tracks between the rails.

Q. Between the rails, do you say?

A. Yes, sir.

Q. What would you lay it on?

A. Lay it up on some timbers.

Q. What timbers were they?

A. Timbers laid across the rail at each end, and we lay it on that and saw it.

Q. Where do you get those timbers from, and what were they?

A. I don't know where they got them.

Q. What were they? Pieces of new guard rail, old guard rail, cross ties, or what?

A. I don't know.

Q. You don't know what timber you laid across the track in order to lay the new guard rail on, you say?

A. I don't know; don't remember what kind of wood we had at that time.

Q. You say they were laid across the rails of the track, and those new guard rails were laid on top of that timber?

A. Yes, sir.

Q. About how big a piece of timber was it that you would lay across the rail in order to lay the new guard rails on it?

A. About six by eight.

Q. How many pieces would you lay across the track in order to lay the guard rail on that you wanted the daps in?

A. Two.

Q. Is that the way you put down the framed guard rails on that day?

A. Yes, sir.

Q. While you were framing guard rails there, did any trains pass?

A. Yes, sir.

Q. If so, I wish you would mention all the trains you now recollect passing over that bridge prior to the time when Holbrook was killed; I mean by that, before he was killed?

A. Well, there were several trains that passed over it, but I don't remember as to the number of them.

Q. Well, have you any special reason for remembering any special train, and if so, state what it was, what train it was?

A. I remember a train that was on the bridge at the time he was killed.

Q. Well, before that train, do you remember another train, or any special occurrence that caused it to bear on your mind and if so, what was it?

A. (A pause without response.)

Q. In the forenoon, before dinner?

A. Well, there was one train that I remember.

Q. What train was it, and tell what occurred, I mean when it went by?

A. It was a coal train, with two engines, and the engines were running backwards.

34 Q. Well, what occurred when that train went to go over that bridge?

A. Well, when that train came around the curve we had one guard rail up on those pieces across the track, and four men were bringing in another one.

Q. Well, what happened to those four men, or what came near to happening to them?

Defendant's Objection.—Counsel for defendant object to the question, and say that it is not what came near happening to them, but what did happen that is complained of in this case, and therefore the answer called for by the question is irrelevant.

The Court: I do not see the materiality of the question.

Counsel for plaintiff says that he considers this inquiry material in the way of bringing home notice to the foreman of what would likely, in the absence of a flag, and what did nearly happen. Counsel for plaintiff says, however, he will change the form of his question.

Q. Mr. Harrison, just tell the jury what occurred when that coal train came around the curve and approached the bridge while those four men had that guard rail up carrying it in?

Defendant's Objection.—Counsel for the defendant object to the question, and say it is immaterial.

Counsel for plaintiff replies and says that it tends to show notice to the railway company.

Objection overruled.

Defendant excepts.

A. Well, they cleared up the track, and with the exception of one guard rail, which did not exactly get in the clear, and the train in passing over the bridge struck it and knocked it twelve or fifteen feet along in the bridge, and it fell in between the steel rail and the wooden rail.

Q. What space of time did the four men with that guard rail have to get out of the way of that train before the train was on them?

35 Defendant's Objection.—Counsel for defendant object to the question, because immaterial and irrelevant, and having nothing to do with the issues in this case.

Objection overruled.

Defendant excepts.

A. I do not know just as to what time, but it was a very short time, though.

*Court's Instruction to Jury.*

The COURT: Gentlemen of the jury, this last bit of information is allowed to go to you for the purpose of showing, if it does seem to show to you, or if it tends to show, that the foreman, and also in the same way the members of the bridge crew, knew the danger the men were in while working on the bridge. It is not admitted on the theory that if there was negligence in the forenoon, that therefore you may properly infer there was negligence in the afternoon. Do you catch the distinction? This is only admitted for the purpose, in so far as it tends to show, notice to the foreman and the bridge crew as well, of the danger that they were all in there under the circumstances.

Q. Mr. Harrison, can you give the jury some idea, in your own way, whether or not that coal train came near catching those four men, or not; if so, just tell the facts with reference to the approach of the coal train upon the four men who had the guard rail?

Defendant's Objection.—Counsel for defendant object to the question as immaterial and irrelevant.

The COURT: I will overrule the objection for the reason explained to the jury a while ago.

Defendant excepts.

A. Well, it got pretty close on one of them that I noticed, Bill Henkle, a man that had hold of the guard rail trying to get it down in the clear some way, and with his back to the train. It was very close on him when he jumped across to the east-bound track.

Q. I understood you just a moment ago to say that they were unable to get one of the pieces of timber that was laying across the track out of the way, and that the train did strike that piece  
36 of timber and knocked it some distance, is that correct?

A. No, sir; I did not.

Q. You did not what?

A. It was one of the guard rails. It was not laying across the track; it was laying lengthwise with the track.

Q. Inside or outside of the rail?

A. Outside of the rail.

Q. How did the train happen to strike that piece of guard rail?

A. One end of it was kind of up on the wooden guard rail.

Q. How far did the train knock that piece of timber?

A. Oh, probably ten or twelve feet.

Q. You spoke of that as a coal train. Just describe what sort

of train it was, with reference to the speed at which it was going as compared with a passenger train?

A. As to what speed it was making?

Q. As to the speed of the coal train you have referred to, what speed was it making as compared with the speed made by a passenger train?

A. I don't know that I could give the speed of the train, as to what it was running.

The COURT: Mr. Werth means was it running faster or slower than ordinary passenger train's speed.

WITNESS: (A pause without response.)

Q. Was the coal train going faster or slower than passenger trains that go over that bridge?

A. I don't know that he was going as fast as a passenger train would go.

Q. That is what I am asking. Do you know that it was not going as fast as a passenger train?

A. I don't know.

Q. What did that engineer do as he approached that bridge for the purpose of avoiding an accident?

A. He blew the whistle.

Q. How many whistles did he blow, or what sort of whistles did he blow?

A. I don't know; he was blowing the whistle very fast. I could not count the sounds of the whistle.

Q. Did he make any attempt to stop the train, or not?

A. I couldn't tell.

Q. In what direction was that coal train going, east or west?

A. West.

Q. What track was it on?

A. West-bound track.

Q. You spoke of the curve of it as it came around; what curve did you refer to?

A. The curve east of the bridge.

Q. How many cars were in that coal train?

A. I didn't count them.

37 Q. Was it a double-header, a single-header, one engine, or two?

A. Two.

Q. How often have you seen through passenger trains going over that line pass along the track while you were working on it, such trains as No. 15, No. 16, No. 4 and No. 3? Did you see those trains pass daily?

A. Yes sir.

Q. What speed do they make going along there in that immediate section, generally?

A. I don't know the speed of the trains.

Q. Can't you form an idea of it? The court does not expect you to give mathematically the speed they were making, but will you give me an idea of what speed you think those passenger trains made?

Defendant's Objection.—Counsel for defendant object to the question because immaterial and irrelevant.

The COURT: I think counsel for the plaintiff has the right to show whether the foreman, and in that connection also whether the decedent and other members of the crew, knew that there were trains that passed that bridge when going at a high rate of speed, and possibly did not know they were coming until they approached near to them, and therefore had to take precautions to prevent such trains coming suddenly upon the men. I say, I think that is properly a part of the plaintiff's case, and that therefore this inquiry is relevant and proper.

Defendant excepts.

Mr. McCORMICK: Do you know anything about the speed of trains?

WITNESS: No, sir.

Mr. McCORMICK: Have you had experience with that matter?

WITNESS: No, sir.

Q. Can you tell me whether they usually went faster than coal trains, or freight trains went?

A. Passenger trains?

Q. Yes, passenger trains.

Defendant's objection.

Objection overruled.

Defendant excepts.

38 A. They went faster than some coal trains or freight trains, while I have seen other freight trains run at about the same rate as passenger trains run.

Q. What freight trains would they be that ran as fast as No. 15, 16, four and three? What freight trains would run as fast as either one of these four passenger trains?

A. I have seen No. 85 when it looked like it was running almost as fast as they do, but I don't know anything about the speed of trains?

Q. What is No. 85?

A. No. 85 is the time freight going west.

Q. A through time freight train?

A. Yes, sir.

Q. What is No. 92?

A. I don't know.

Q. What is No. 86?

A. No. 86 is the time freight going east.

Q. What is No. 84?

A. I don't know.

Q. You say you have seen these time freights make as fast speed as passenger trains do, or did I understand you to say that?

A. I can't tell by looking at a train whether one is running as fast as another, or not. I have seen them when they looked like they were running near it.

Q. The same speed as the passenger train, is that what you mean?

A. Yes, sir.

Q. You mentioned a coal train and an incident connected with it. What other trains do you now recall as having passed over the bridge in question before Tom Holbrook was killed?

A. I don't remember any particular one except the two I have mentioned, that is, as to paying any particular attention to them.

Q. Do you mean by that to say that no others did pass, or that you did not pay any particular attention to them?

A. Oh, there was others that passed, but a man working on a bridge every day don't pay particular attention to all trains that pass, or at least I ever did.

Q. Why does he not pay particular attention to them?

A. He gets out in the clear until they pass and then goes back to work.

Q. You do not seem to have understood my question. You said you did not pay particular attention to trains, that bridge men did not. I ask you now why it is that bridge men do not pay particular attention to the passage of trains?

A. I said I didn't pay particular attention.

Q. Why didn't you pay particular attention to them when they passed? Why is it that you did not do it?

A. I didn't know as it was my duty to pay particular attention to them.

Q. Well, that is probably entirely correct, but what I am trying to get you to say is—

39 Defendant's Objection.—Counsel for defendant object to counsel for plaintiff telling the witness what he wishes him to say.

Counsel for plaintiff replies that he is merely trying to direct the witness's attention to the matter desired to be investigated and did not want to lead the witness.

The Court: Well, just direct the witness's mind to the point you wish to interrogate him upon.

Q. Do bridge men work on bridges every day?

A. No, sir, not every day.

Q. Do they get used to trains passing along the track?

A. Yes, sir, I suppose so.

Q. I will ask you to tell the jury what sort of a train was the other train that you have referred to as going east over this bridge before Tom Holbrook was killed; that is, with reference to whether it had one engine or two?

A. It had two.

Q. What are such trains called?

A. Freight trains.

Q. What is a train with two engines attached to it called in order to distinguish it from a train that has only one engine attached to it?

A. Double-header.

Q. Did the train that passed just before Tom Holbrook was killed have two engines, and was it known as a double-header?

A. Yes, sir.

(At this point, with the direct examination of witness Harrison not concluded, the court took a recess at one o'clock until two o'clock P. M.)

SATURDAY, June Twenty-first, 1913.

(Afternoon Session.)

Court reconvened at 2 P. M., pursuant to recess.

The plaintiff having begun the introduction of her evidence in chief, and not having concluded same upon the taking of recess, continued to introduce same, as follows:

A. L. HARRISON, for plaintiff, on stand from morning session.

On direct examination by Mr. WERTH:

Q. What effect did the passage of that freight train going east have upon smoke accumulating in the tunnel as it came  
40 through; in other words, what became of the smoke?

A. (A pause without response.)

Q. That freight train I am talking about, said to have been No. 92?

A. Well, the freight train pulled a considerable lot of smoke out of the tunnel.

Q. To what extent did it pull smoke out of the tunnel, and to what extent did smoke settle over and upon the bridge, if any?

A. The smoke settled over the bridge until I couldn't see but one man from where I was at.

Q. What was the effect of that smoke with reference to obscuring the vision of the men on the bridge and preventing their seeing trains approach from the east?

A. I don't know I could see only——

Q. (Interposing.) Where were you on the bridge?

A. I was near the east end of the bridge.

Q. You could see smoke between you and the west end of the bridge, I suppose?

A. Yes, sir.

Q. Suppose a man had been at the west end of the bridge looking east, what effect, if any, would that smoke have had upon his being able to see a train coming from the east?

Defendant's Objection.—Counsel for defendant object to the question because calling for the conclusion of the witness, and therefore improper.

Counsel for plaintiff says he will withdraw the question.

Q. When was the last time you saw Tom Holbrook alive?

A. The last time I saw him alive was a little ways from the east end of the bridge laying on the push car.

Q. That was after he had been hit, I presume?

A. Yes, sir.

Q. I had reference to the last time you saw him before he was struck by the train, on the bridge I mean?



A. The last time I saw him on the bridge until after train fifteen had passed was when he had stepped up to a piece of timber right across the rail, and then the smoke came over and hid him from me, and I never seen him any more until after the train had passed.

Q. How far were you from the east end of the bridge and from Tom Holbrook at the time you saw smoke hide him from your sight?

A. I never noticed just how far I was from the east end.

Q. Give the jury the best idea you can of that?

A. I don't know whether I was on the first or the second floor beam from the end.

41 Q. From the east end?

A. Yes, sir.

Q. About where was he from the west end of the bridge at the time when the smoke hid him from your view.

A. Well, he was a little bit east of the center of the bridge.

Q. And you, if I understood you correctly, were somewhere about the second or the first floor beam near the east end of the bridge?

A. Yes, sir.

Q. Now, you said that when the smoke hid him from your view, just what do you mean by that?

A. I mean that the smoke was so thick that I never seen him any more, that I couldn't see him.

Q. Tell the jury just as near as you can, and I mean by that give them your opinion, as to the distance from where you stood to where you saw the smoke envelop and hide Tom Holbrook from your view; that is, whether it was ten feet, twenty feet, thirty feet, forty feet, or fifty feet, or whatever number of feet you think it was. Give it just as near as you can come at it.

A. It was probably fifty or sixty feet from me.

Q. At that time there was the freight train that was going east that had come out of the tunnel and made that smoke?

A. It was on the east bound track on the bridge.

Q. What occurred when that train came out of the tunnel going east on the east bound track? I mean, what was the next thing that occurred there after the freight train came out of the tunnel and started across the bridge?

A. I did not understand the question.

Q. I will ask the stenographer to repeat it to us.

(Which is done.)

Q. What did you ever see done or hear said by anybody on the bridge?

A. I don't remember that I heard any thing said by any of them.

Q. Tell the jury, if you know, whether foreman Carbaugh, when that train came out of the tunnel on to the east bound track, give any orders with reference to doing or not doing anything, and, if so, what was it?

A. I did not hear any orders.

Q. I will ask you if you heard foreman Carbaugh give you any

orders or give the men any orders, to clear the track on account of that east bound freight train?

A. I did not. I was putting in bolts.

Q. Did you hear foreman Carbaugh, or anybody else, holler "railroad!" when the freight train emerged from the east end of the tunnel and proceeded across that bridge?

A. I did not. I heard some one holler "railroad!" when No. 15 came around the curve. I also hollered myself.

42 Q. What was the proper and usual thing for the foreman to do when that freight train emerged from the tunnel and started across the bridge on the eastbound track?

Defendant's Objection.—Counsel for defendant object to the general form of the question propounded, and say if there is any rule or regulation imposed by the defendant company that same should be produced.

Counsel for plaintiff says he will not insist upon an answer to the question.

Q. How long have you been working on bridge work for railroads?

A. I don't remember just how long.

Q. During your lifetime I have reference to, including your work on the Norfolk & Western Railway and on other railways which you have referred to and for whom you said you had worked?

A. I don't remember the length of time.

Q. Well, give me your idea or best judgment and say how long you worked, all put together.

A. Six or seven years I guess.

Q. What positions have you held during that time? Were you always a laboring man, or did you occupy any other position at any time?

A. I occupied the position of assistant foreman, once.

Q. Who did you work as assistant foreman for?

A. D. C. Leonard.

Q. On what railroad?

A. On the Virginia & Southwestern division of the Southern Railway.

Q. Do you know what is the usual and customary thing to be done when men are working on a bridge, upon which there are double tracks located, when a train crosses that bridge on a track other than the one they are working on?

A. I do not; I do not know the instructions.

Q. I did not ask you what the instructions were. I asked you if you knew what they usually did with reference to clearing the track, I mean. In order to make the question more specific I will ask you, what did the usual custom of railroads require when the freight came out of a tunnel on to a bridge, such as the bridge in question, and proceeded across that bridge—what was the usual custom with reference to the men clearing the west bound track?

A. They usually cleared the track on the opposite track.

Q. You say you heard no orders from the foreman to clear the track when the east bound freight train came out of the tunnel?

43 A. No sir, I was a little ways from where they were putting down guard rails and I heard no orders.

Q. You were working on the bridge?

A. Yes, sir.

Q. You were one of the force that Mr. Carbaugh was working there?

A. Yes, sir.

Q. And you were doing what?

A. Putting in guard rail bolts.

Q. What did the men do that were on the bridge when that freight train came out of the tunnel and enveloped the bridge in smoke? Did the men do anything with reference to clearing the west bound track?

A. I couldn't see in there and I don't know what they did.

Q. Did you hear anybody, the foreman or any other person, say "clear up!" or anything to that effect?

A. No, sir.

Defendant's Objection.—Counsel for defendant object to that portion of the question asked as to anybody else, because there was nobody else in authority with that bridge force of men.

Counsel for plaintiff says that he withdraws that part of the question.

Q. What occurred next after you saw Tom Holbrook enveloped by smoke? You say that was the last time you saw him before he was struck. Now, I want to know what was the next thing that occurred.

A. The next thing that occurred was No. 15.

Q. What was the first notice that you had that No. 15 was immediately approaching the bridge?

A. I heard some one holler "railroad," and I looked and saw No. 15 coming.

Q. You, if I understand, were near the east end of the bridge?

A. Yes, sir.

Q. After you heard somebody holler, "railroad," or before that time, had you seen or heard anything to indicate that No. 15 was approaching?

A. No, sir.

Q. Did No. 15 blow any whistle at or about the bridge?

A. I heard the sound of the whistle before No. 15 struck the bridge.

Q. About the time when you heard the whistle. About what time did you hear the whistle with reference to the time that you looked up and saw No. 15 running on the bridge? I mean, was No. 15 on the bridge or away from the bridge when it whistled?

A. He wasn't on the bridge when he whistled.

Q. About how near to the bridge was it when you heard the whistle?

A. I don't know. I was back behind the bracket.

44 Q. Give your best judgment and opinion as to how near to the bridge No. 15 was when it whistled?

A. I don't know. I can't give you any particulars.

Q. You have an opinion on that subject, haven't you?

A. Fifteen seemed to be very near the bridge though when I heard the whistle.

Q. Well, now what do you mean by very near the bridge? I want you to give us your best judgment on the question of how close No. 15 was to the bridge when it whistled?

A. No. 15 came around the curve and I seen it and I hollered "railroad!" and then got back behind the bracket and wasn't looking at it any more.

Mr. McCORMICK: Did I understand that you also hollered "railroad?"

A. Yes, sir.

Q. Who was it that had hollered railroad?

A. I don't know.

Q. Did you or not hear any other man holler "railroad" before you hollered?

A. Yes, sir.

Q. And when you heard the other man holler "railroad" you repeated the cry?

A. Yes, sir.

Q. Was that after Tom Holbrook had been enveloped by smoke and hidden from your view?

A. Yes, sir.

Q. How much time intervened between that time, when the man hollered "railroad," and the time when that train was on the bridge? Can you form any idea of it?

A. I didn't remember as to the time.

Q. Well, now, you saw that smoke there, and you know how thick it was. I will ask you to tell the jury if in your opinion a man standing where you last saw Holbrook could have seen that train from that position, could have seen No. 15 approach?

Defendant's Objection.—Counsel for defendant object to the question, because calling upon the witness to express a mere opinion, and that is a matter for the jury after the witnesses have stated facts.

The COURT: I will overrule the objection because I think that is the way counsel for plaintiff may show whether the smoke was thick enough to obscure the vision of a person, or not.

Defendant excepts.

A. The smoke was thick enough that I couldn't see him.

45 Q. You say he was standing by a piece of timber the last time you saw him?

Mr. McCORMICK: No, the witness says he was going towards the piece of timber.

Mr. WERTH: Well, I understood him to say he was standing by a piece of timber, and the witness may say.

A. I said he had stepped up to a piece of timber that was lying across the rails.

Q. You say he had stepped up to a piece of timber that was laid across the rails?

A. Yes, sir.

Q. Just what was he doing at the moment you lost sight of him, if you know?

A. The moment I lost sight of him he wasn't making any effort to do anything.

Q. What piece of timber was it he had stepped up to?

A. A piece laid across the rail to lay the guard rails on to frame it.

Q. What track was that piece of timber across?

A. The west bound track.

Q. What did each end of that piece of timber rest on?

A. On the rail.

Q. Do you mean the rails that trains run on as they cross the bridge on the west bound track?

A. Yes, sir.

Q. Was that piece of timber a cross tie, an old guard rail or a new guard rail?

A. I don't remember.

Q. Was it one or other of those pieces of timber?

A. I don't remember as to the timber.

Q. Who had put that piece of timber there?

A. I don't know.

Q. How many pieces of timber like that one had been put across that track for the purpose of framing new guard rails with it, that you know of?

A. I don't know. I don't remember how many guard rails had been framed to put on it.

Q. Where had they framed all of the guard rails that were framed there that day? I mean by that, on the track or off the track?

A. On the track.

Q. After No. 15 ran on to the bridge and passed by what next occurred; what was the next thing that happened?

A. The next thing we did we carried Tom Holbrook and put him out a little piece from the bridge.

Q. Then I understand from your last answer, that after No. 15 passed there you found Tom Holbrook and something had happened to him?

A. Yes, sir.

46 Q. What had happened to him apparently?

A. I don't know what had struck him. I didn't see him struck at all.

Q. Had he been struck?

A. His skull was mashed in, his head.

Q. Were any of his brains knocked out and scattered around?

A. Well, on the side of the girder there was something in there that looked like brains.

Q. Any blood?

A. A considerable lot of blood.

Q. Well, what was the result of that blow on his head, what effect did it have on Tom Holbrook; did he die or get well?

A. He died.

Q. When and where did he die?

A. He died there on that push car at the east end of the bridge.

Q. How long was it after he had been struck before he died?

A. I don't know.

Q. Can you give any idea about it; whether it was five minutes, or ten minutes or an hour?

A. I went to Davy after a doctor and he was dead when I came back.

Q. Who was the first man who got to Tom Holbrook after No. 15 passed?

A. I don't remember. There were two or three that got there about the same time.

Q. Were you among the number?

A. I was one of the first ones to pick him up.

Q. Did you make an examination after you went there to see what had become of the piece of timber that he was standing by the last time you saw him?

A. Yes, sir.

Q. Did you look for that piece of timber?

A. Yes, sir.

Q. Why did you look for it; what was your reason for looking for it again?

A. I thought No. 15 had struck it and had killed him with the timber.

Q. You thought that No. 15 had struck the timber and had made the timber strike him?

A. Yes, sir.

Q. What did you ascertain with reference to that? What did you find out about that?

A. I found the piece of timber laying on the outside of the wooden guard rail, on the ends or heads of the ties?

Q. Parallel with the rail or across the rail?

A. With the rail.

Q. Could that piece of timber have been knocked into the position, that you found it in, by that train?

A. I don't know.

Q. What was its position with reference to the position it would have been in if it had been picked up and cleared as a railroad man would clear it?

A. It was lying like it had been cleared by a man; like a railroad man would have cleared it.

47 Q. Were you on the bridge when regular No. 15 passed by that morning?

A. No, sir.

Q. Did you see regular No. 15 pass?

A. Yes, sir.

Q. Did you know anything about whether regular No. 15 carried any special signals, or not?

A. Yes, sir, it carried signals.

Q. What did those signals say? What did those signals tell the foreman?

A. That there was another fifteen.

Q. That there was another 15, why? What did they indicate? What were the signals put on regular No. 15 for?

A. To indicate another section of the train.

Q. Then to indicate another section of the train, to follow do you mean, to come later?

A. Yes, sir.

Q. Did the signals indicate when it would come, at what time?

A. No, sir.

Q. Did Mr. Carbaugh, the foreman, have any time on it, the second section?

A. I don't know.

Q. Was there any telegraph office there at Pando?

A. No, sir.

Q. Was there any depot there?

A. No, sir.

Q. Was there any station there?

A. Flag station.

Q. Was there a flag station at that time?

A. Yes, sir, it was a flag station.

Q. What do you do with a situation of that kind: what is usually and generally done by the foreman for the purpose of protecting the men on the bridge from the passage of trains at full speed coming around a curve unexpectedly? What is usually and generally done to protect the men in that situation?

A. The use of flags.

Q. Were any flags put out there that day?

A. None that I know of.

Q. Was any watchman stationed to watch for the approach of trains in either direction that you know of?

A. No, sir.

Q. Was anything done that you know of to give the engineer of an approaching train warning of men on the bridge?

A. No, sir.

Q. Was anything done, so far as you know, to give men on the bridge warning of the approach of trains?

A. No, sir.

Q. Bearing in mind the situation that you have described here, and I mean by that, the tunnel at the west end of the bridge, the curve at the east end of the bridge, and the passing of trains over the bridge, the throwing out of smoke by trains going east over the bridge, what is the general custom of railroads for whom you have worked with reference to having a flag out for the protection of the men at work under such circumstances?

Defendant's Objection.—Counsel for the defendant object to the custom of railroads as not admissible, and say that the question here is whether the defendant has used reasonable precaution.

Counsel for plaintiff replies that he points to the case of the Southern Railway against Blanford (—) in which the identical question was settled.

Objection overruled.

Defendant excepts.



A. Well, I have worked on the Norfolk & Western Railway some, not putting in repair work that way, without a flag, had no flag either way. The foreman would tell them to keep a lookout and had no flags out. On the Southern Railway, while I was over there, we would stick out flags that way on repair work, on a staff. We would drive up a staff and stick a flag in it on repair work.

Q. Is that all of your answer?

A. Yes, sir.

Q. You will observe, Mr. Harrison, that I haven't asked you what any railroad did sometimes. I had reference to what was the general custom, and I had reference to a situation such as you have described here, that existed on this bridge, on January 4, 1913. I want the general custom and not what is sometimes done by some railroad.

Defendant's Objection.—Counsel for defendant object to the question, because the witness has not shown that he knows anything about the general custom, or that he knows anything except the custom prevailing upon such railroads as he has worked upon.

The Court: The witness may answer as to such railroads as he has worked on.

Defendant excepts.

A. On the Norfolk & Western.

Q. All railroads with whose general custom you know about.

Now, Mr. Harrison, I do not have reference to repair work  
49 on straight track a mile each way, but have reference to repair work done under the circumstances that this work was done under, at the bridge at Pando.

A. Well, I told you that on the Southern Railroad we just stuck out flags in staffs for repair work, and when tearing out work we put men out with flags.

Q. Well, what about the Norfolk & Western Railway; what is the general custom of foremen on the Norfolk & Western Railway?

A. The general custom with them was that on the repair work, guard rails and such as that, they have out no flag.

Q. Was that the general custom at a situation such as I have described at this bridge, with a tunnel at one end, and a curve at the other, and covered with smoke; was that the general custom under such situation?

A. That is the first case that I ever worked in of that kind. That is the only case on the Norfolk & Western that I ever worked on of that kind.

Q. Is that the only place they have with a bridge and a curve on one end, or either end?

A. That is the only one I ever worked at, at that time, with a curve and close to a tunnel.

Q. With your knowledge and experience of railroad work, was it proper, according to the general usage and custom of railroad men, to have had a flag out at Pando on January 4, 1913, when you were working on that bridge?

Defendant's Objection.—Counsel for defendant object to the ques-

tion, because it only shows what the custom was on the N. & W. and Southern Railways, and that is not the general custom.

The COURT: I think it is for the jury to say what is proper under the circumstances, but the witness may tell the facts.

Counsel for plaintiff says that is what he intended to ask the witness for, but probably did not make it clear.

The COURT: Your question included the words "was it proper." I think that objectionable.

Q. With your knowledge and experience of railroad work was it usual and customary to have a flag out at Pando on January 4, 1913, when you were working on that bridge?

Defendant's Objection.—Counsel for defendant object to the question, because the witness does not know and has not testified as to the custom on other railroads at all. The question is too general to be propounded to the witness.

Objection overruled.

Defendant excepts.

A. It was not customary with that gang to have a flag out when putting in guard rails.

Q. Mr. Harrison, the custom and usage is not fixed by what a particular men does, but is fixed by what the general run of men do. In answering my question, I will not request that you bear in mind what the general run of foremen do under such circumstances and not what a particular foreman does?

A. I don't know what the general run of foremen on the Norfolk & Western Railway do.

Q. Are you familiar with the rules of the Norfolk & Western?

A. No, sir.

Q. All right.

The COURT: Mr. Werth, I doubt the propriety of your asking about one railroad, such as the Southern Railway. When I permitted the question to be propounded and answered, I thought you were going to follow it up by asking what was done on the C., C. & O. Railway.

Mr. WERTH: All right I had intended to ask about that.

Q. You say that you worked for the C., C. & O. Railway. What was the custom of foremen on that railroad with reference to doing such work?

Mr. McCORMICK: What were the circumstances; was the railroad double-tracked or not?

WITNESS: No, sir, it was single track.

The COURT: I think you may ask the witness anything like the same circumstances.

A. I worked on the C., C. & O. railroad, but about three months, and during the time I was over there the principal part of the work was brace work and repair work and we used no flag.

Q. What do you mean by brace work and repair work?

A. Bracing bents, wooden bridges, or timber bridges.

Q. What other railroads have you worked for?

51 A. No other ones at all outside of the ones I told you.

Q. You say you are not familiar with railroads other than the Norfolk & Western?

A. No, sir.

Q. A little while ago I asked you a question, and I now refer to the first question I asked you in this connection, and that is, how men doing such work were usually protected, and you answered that they were usually protected by flag. What did you mean by that answer? How were they protected by flag?

A. How were they protected by flag?

Q. Yes; how would you do it?

A. A man with a red flag.

Q. What would a man with a red flag do? Explain what is meant by flagging, to the jury?

A. Well, a man is sent back a sufficient distance from where the work is at with a flag to flag trains.

Q. What was the usual distance?

A. I don't know. I never flagged any.

Q. Do you know the number of telegraph poles he was generally required to go back?

A. No, sir.

Q. How long would it take six men at work on a bridge like that with the material you have described scattered on and across the west bound track, to clear up that track for the passage of a train, after they are ordered to do so by the foreman?

A. I do not know that I could state just how long it would take.

Q. You can give an idea, can not you?

A. It would depend on the speed that they work at.

Q. Now, suppose them to have had timbers across the west bound track as you have described, and other timbers lying on top of those timbers, and men engaged on the top of the timber in framing it, mortising daps in it, and other men taking out bolts and still others putting bolts in; and then suppose a passenger train, No. 15, to have come around the curve at its usual rate of speed, which would have happened first, the passenger train on the bridge or the men clearing the bridge, which would have happened first?

Defendant's Objection.—Question objected to by counsel for defendant.

Q. That last part of the question does not seem to make any sense. Would that train have gotten on the bridge before the men could have cleared it, or not?

Question objected to by counsel for defendant.

52 Mr. McCORMICK: The question is, whether it did get on there before the men cleared it, or whether they had an opportunity to clear it.

Mr. WERTH: I think that is a proper question.

Mr. McCORMICK: That is purely a matter of opinion, of which the jury are just as good judges as anybody else. It does not seem

to me that this witness knows any more about it than I know about it, or than these gentlemen there know about it.

Objection overruled: defendant excepts.

Q. Go ahead now and answer the question. (Question read to witness.)

A. I couldn't say.

Q. You can give me your opinion, can't you?

A. There would have been only one way for me to have told and that would have been for the timber to have been on there when No. 15 came around there.

Q. You mean by that, the only way you could tell would be for you to undertake to say whether you could clear it after you saw fifteen coming around the curve?

A. Yes, sir.

Mr. SMITH: We object to that question as leading. That is leading the witness to make him state something entirely different from what the question implies. The answer of the witness, as I understand it, implies that he could not tell that they could not have gotten the timber off before the train got there, unless that had happened. That is what the answer conveys to me.

Mr. WERTH: I do not think that you caught the witness correctly. I think he means to say he cannot form an opinion unless he did the job. Read the question, Mr. Morris.

The COURT: Go ahead. Let the witness explain what he does mean.

Mr. WERTH:

Q. You have said in a preceding answer that the only way you could tell was for the timber to have been on there when fifteen came around the curve. I have understood you to state in your preceding examination that the piece of timber was on the west bound track when fifteen did come around the curve, and that Tom Holbrook was standing by that piece of timber.

53 Mr. McCORMICK: No, sir, he did not state that; he did not make that statement.

A. No, sir, I did not say that.

Q. What did you state as to that?

A. I said the last time I saw Tom Holbrook he was stepping up to the piece of timber on the side of the track.

Q. How long after that before you saw or heard No. 15 come around the curve?

A. I do not know how long it was.

Q. You do not know how long it was?

A. No, sir.

The COURT: Witness, you waste a great deal of time. You have been asked hundreds of times how long before such a thing happened, and your invariable answer is, "I do not know," and after it is gotten out of you, we find that you do know. Nobody wants you to speak with mathematical accuracy. You did not keep notes or

see the time of day with your watch; that is not what they are after. We are after your recollection or idea of the time. They are not trying to trap you, but what they want is your honest recollection about the time, and distance and things like that.

Mr. WERTH: Now, please read the question. (Question read.)

Mr. McCORMICK: That is, after you saw Holbrook?

A. Probably thirty seconds, or may be a minute after I saw him.

Q. I want your opinion, Mr. Harrison, whether or not the men could have cleared that bridge with the obstruction that you have mentioned within the time that it would have taken passenger train No. 15 to have gotten from the curve on to the bridge; give me your opinion on that?

Question objected to by counsel for defendant.

Objection overruled: defendant excepts.

Q. Go ahead, Mr. Harrison, and tell what you think about that.

A. They might have cleared the bridge and they might not. I can not state as to that.

Q. Now, Mr. Harrison, describe the floor of that bridge, I mean were the spaces between the ties closed up or open, and was the space between the track closed up or open?

A. Open.

Q. This diagram that I hold in my hand is supposed to roughly represent the tunnel and the approaches at Pando, where Tom Holbrook was killed. This is supposed to represent the ties on  
54 the west bound track, and this the same on the east bound track. Now, what was between those two tracks, an open space or a closed up space?

A. It was an open space.

Q. Was that space crossed by anything, did anything cross that space at intervals?

A. The floor beam crossed it.

Q. How far were they apart, or about how far?

A. I do not remember how far they were apart.

Q. About how far were the two tracks, the east and west bound tracks?

A. I think you could step from one to the other very handy.

Q. Yes, sir, but that does not give me very much idea of the distance. A man can step three feet, and a long legged man might step more than that, and a short legged man might not step three feet. Now, about how far apart were they so far as you can tell?

A. To the best of my recollection the ties were about three feet apart.

Q. The ends of the ties of the two tracks were about three feet apart, you think?

A. Yes, sir, to the best of my recollection.

Q. Under there, now, there was nothing but Tug river, if I understand you right?

A. Tug river ran under the bridge.

Q. Was there anything between there and Tug river?

A. Yes, sir, the bridge came out on to the ground some little distance.

Q. I am talking about the space between the two tracks on the bridge, that space in there (indicating). If a man stepped over there, where would he step to; where would he land if he stepped in there?

A. He would land under the bridge.

Q. Where would that be, on the ground, or in the river?

A. At either — he would have been on the ground.

Q. But suppose he was in the middle of the bridge where Tom Holbrook was, or about the middle of the bridge?

A. He would have been in the river.

Q. You say you don't know exactly how far these floor beams are apart?

A. No, sir.

Q. The floor beams are about the same distance that the girders are, are they not?

A. You mean the same length as the girders.

Q. No, sir, I mean the distance between them.

A. I do not understand your question.

Q. These are what I call the girders (indicating), may be I am wrong about naming them. What are those things?

A. The Brackets.

55 Q. Does one of those brackets represent the floor beam, wherever that is?

A. Yes, sir, they set on the floor beams.

Mr. McCORMICK: Is that the floor beam between the tracks, or what?

WITNESS: This is the floor beam that these brackets set on.

Q. That floor beams extends all the way across the bridge and between the tracks, doesn't it?

A. Yes, sir.

Mr. McCORMICK: Between the tracks?

WITNESS: Yes, sir.

Q. This photograph is supposed to represent the bridge there, these things which you see crossing there at intervals they are the floor beams, are they not?

A. Yes, sir.

Q. And in between each floor beam is an open space, and there is nothing between that and the river?

A. No, sir.

Q. You say you don't know the rules of the defendant company with reference to bridge men and bridge foremen?

A. No, sir.

Q. Did you ever have any of them?

A. No, sir.

Q. Did the men that you worked with have those rules?

A. I don't know.

Q. So far as you know, did they, or not have them?

A. I say I do not know.

Mr. McCORMICK: I do not think that is material; the witness said he did not know, and I do not think that is proper examination.

Mr. WERTH: Very well.

Q. How long had you known Tom Holbrook before he was killed?

A. About five months.

Q. During that five months did you work with him just occasionally, or regularly?

A. I worked with him mostly all the time.

Q. Did you work under the same foreman and on the same bridge force?

A. Yes, sir.

Q. Did you know him very well?

A. Yes, sir, I knowed the man very well.

Q. What sort of a bridgeman was he, I mean was he a good bridgeman, a first class man, or a second class man, or how was he rated as a bridgeman?

A. He was rated first class.

56 Q. On the date when he was killed, you were with him all that day?

A. Yes, sir.

Q. Where did you bridge men stay at night?

A. We staid in the camp cars.

Q. So you staid together at night, and also in the day time?

A. Yes, sir.

Q. Were you with Tom Holbrook a good deal at night?

A. Some nights I was and some nights I was not.

Q. On the date he was killed, did you see any indication in him of being drunk?

A. No, sir.

Q. Did you see any signs that he had lost his mind, or was demented, or anything of that sort?

A. No, sir.

Q. What was his general condition on that day and how did he appear to perform his duties on that day?

A. He performed his duties as usual, he was a good careful man.

Q. You say he was a good careful man?

A. Yes, sir.

Q. I will ask you to tell the jury whether or not it was customary for the foreman, Anderson, to go out with his crowd, or was it customary for him to stay at home and send them out under Mr. Carbaugh?

Question objected to by counsel for defendant.

Objection sustained.

Mr. WERTH: I will withdraw that question, then.

Cross-examination.

By Mr. McCORMICK:

Q. I understood you to say that you had been in the service of the Norfolk & Western Railway Company how long?



A. I did not state how long I had been in the service of the company this last time.

Q. I mean altogether.

A. I worked three different times, and I do not remember as to the length of time.

Q. Well, tell me about how long. You can remember about how long you have been in the service of that company, can you not?

A. A year and a half or two years.

Q. What character of work have you been doing whilst you were in the service of the railway company, I mean of the Norfolk & Western Railway Company?

A. Bridge work.

Q. Now, you had worked some months, I understood you to say, for the Southern Railway?

A. Yes, sir, I had worked four or five years there.

57 Q. What character of work did you do there?

A. Bridge work.

Q. Now, you say you had worked for the C., C. & O. company, if I understand you correctly?

A. Yes, sir.

Q. That is the Clinchfield, Carolina and Ohio Railroad,

A. The Carolina, Clinchfield & Ohio Railroad, yes, sir.

Q. And you worked there for some three months, you say?

A. Yes, sir.

Q. Now, had you done any bridge work while you were there?

A. Yes, sir.

Q. If I understand you correctly, on the C., C. & O. R. R. it was not the custom to send out a flag at all?

A. What time I worked there, most of the work I done was bracing, doing brace work over the road, to the bridges, and they did not use any flag.

Q. You never saw a flagman sent out while you were engaged on that road to apprise men working on the bridge of the approach of a train, is that true, or not?

A. Yes, sir, I have seen flags sent out.

Q. I am talking about, in the matter of putting down and taking up guard rails?

A. I didn't do any work like that, but I seen a flag sent out when we were jacking up the girders.

Q. That is not what I am asking you about. I am talking about the character of the work that you were doing that morning on the Norfolk & Western Railway at Bridge 889-a, taking up guard rails and putting down the same, did you see a flag sent out on an occasion like that on the C., C. & O.?

A. I never done any work like that on the C., C. & O.

Q. Now, on the Southern railroad you say that the habit was to send out flag?

A. To stick up flags in a staff.

Q. Was that at the end of the bridge?

A. No, sir, back from the bridge.

Q. How far from the bridge?

A. They would go back different distances, but they had no certain distance to go back.

Q. They had no certain distance to go back, you say?

A. No, sir.

Q. Now, was that the kind of work that you were doing on the Southern Railway, that you were doing that morning out here on the Norfolk & Western?

A. Mostly all repair work over there that we done, we just put flags in those staffs unless we were tearing out a bridge, or taking the ties out, or the stringers, or something like that, and then we had a man out with a flag.

Q. You had a man out with a flag when there was any obstruction of the track. I mean by that, when the track was torn up, then you had a man out with a flag?

A. Yes, sir.

58 Q. But when you were doing such repair work as you were doing there that morning, with no obstruction to the track at all, did you ever see or know of a flag to be sent out?

A. In putting on guard rails and such as that, we just stuck up those flags.

Q. Did you ever see that done on the Norfolk & Western?

A. No, sir.

Q. There was really, as a matter of fact, no tearing up of the track there that morning at all, was there?

A. At Pando, you mean?

Q. Yes, sir.

A. No, sir, the track was not torn up.

Q. There was no obstruction on the bridge except these pieces that were laid across, as you have stated, to prepare these guard rails to be put down in place of the old ones that were to be taken out? That is all, wasn't it?

A. Yes, sir.

Q. How many of them were there?

A. How many guard rails, you mean?

Q. Yes, sir.

A. I do not remember how many they put on there.

Q. You used, if I understand it correctly, two pieces of timber to frame the guard rail on?

A. Yes, sir.

Q. Now, please take that spectacle case that I have there and my lead pencil and my pen across it, the pencil and the spectacle case will represent the pieces of timber that you laid down there on which to do your work; that is about right isn't it? And on top of that is a piece of timber that you put there for the guard rail, represented by that pen that I have there?

A. Take the spectacle case there and the pencil for the rails and lay another one down there, and then the timber on that, and that would represent it in the shape it was.

Q. That is the same thing exactly; that is about correct, and that is the idea of it, isn't it, that you had two pieces of timber up there, and you put your guard rail on the two pieces of timber?

A. The two pieces of timber laid across the rails and the guard rail laid on it.

Q. And there you made your frame work?

A. Yes, sir.

Q. And all you had to do was to remove that when the train approached?

A. Yes, sir.

Q. Then all that you had to do to clear the track was to remove the three pieces of timber?

A. Yes, sir.

Q. That was the two pieces upon which the guard rail rested and the guard rail itself, that is true, is it not?

A. Yes, sir.

The COURT: What was the size of the pieces of timber on which the guard rail was laid?

59 WITNESS: I do not remember as to the size of them, but something like six by eight.

The COURT: And how long, about?

WITNESS: They were long enough to reach across and rest on one rail and on the other one, about five feet, I should say.

The COURT: Five feet, or something like that?

WITNESS: Yes, sir.

Q. How long was the guard rail?

A. I guess something like eighteen or twenty feet.

Q. In length, you mean, by that?

A. Yes, sir.

Q. And the size?

A. Six by eight.

Q. Now, then, how many of those guard rails were being laid there that morning?

A. I do not remember how many.

Q. Can you not tell me whether or not you did not, as a matter of fact, take only one on the bridge at a time, don't you remember that?

A. We had two on at one time, I remember.

Q. Where were they?

A. One of them was on there and four men were carrying over one on the bridge.

Q. That was early in the morning, wasn't it?

A. Some time during the morning; I do not just remember the hour.

Q. What I want to know now is, at or about the time of this accident, because I am going to get down to that mighty quick. Now, at or about the time of this accident did you have more than one guard rail there on the track?

A. No, sir.

Q. You only had one?

A. Yes, sir.

Q. At what end was that, the east or west end?

A. Something near the middle of the bridge, I believe. It was a little bit to the east end.

Q. And that was composed of these two pieces of timber that you have described and the guard rail itself, and that was all that had to be removed?

A. Yes, sir.

Q. Now, Mr. Harrison, with these forces that they had there, that was the work of a minute or two to take that off and put it aside, wasn't it; a second or two, I mean? I say that was the work of a second or two, to take those pieces of timber up and take that guard rail up and lay them to the side and get them out of the way of an approaching train?

A. I suppose it could have been done in thirty seconds, or something like that, if the men had all been at their places.

Q. The men are supposed to be at their places, are they not; they were at work there, weren't they?

A. Yes, sir.

60 Q. Weren't the men working on it at the time?

A. Yes, sir.

Q. They were up there at that place then, weren't they?

A. Yes, sir, they were there at work at it.

Q. So that it was a very simple matter to take out of the way these three pieces of timber, wasn't it?

A. Yes, sir, a very short time.

Q. You would not like to say how many seconds it would take. It was just the work of picking it up and removing it off; that is all there was about it, wasn't there?

A. That is all there was to it.

Q. Now coming down to another point in the matter, you started out that morning, if I understand you, about seven o'clock, and you got to work about seven o'clock?

A. Yes, sir.

Q. Mr. Anderson, if I understand you correctly, is the regular foreman there?

A. Yes, sir, C. W. Anderson.

Q. He has been described here as a one-legged man. Isn't he a very active man for a one-legged man?

Question objected to by counsel for plaintiff. Objection sustained.

Q. Now, Mr. Carbaugh, when you went there that morning, gave you instructions as to what kind of work you were going to do, didn't he?

A. Yes, sir.

Q. And he told you that you must keep a lookout for all coming trains, east or west, didn't he?

A. No, sir; I do not remember that he told me.

Q. Didn't he tell all of you?

A. He did not tell me, that I remember.

Q. But you knew, as a matter of fact, and all the men working there knew, as a matter of fact, that they must keep a lookout for all trains coming, east or west, and clear both tracks, didn't they.

A. I did.

Q. Didn't all the balance of them know it?

A. I don't know what they knew.

Q. Don't you know the fact that they did clear the track whenever an east bound or west bound train approached?

A. Yes, sir.

Q. When No. 92 came there that morning, came out of the tunnel, it brought with it a lot of smoke that settled on the bridge, and that was a matter of daily occurrence, wasn't it?

A. You mean that morning?

Q. That evening I mean.

A. I don't know that I have ever noticed smoke on the bridge before.

61 Q. Did you ever see a train coming out of the tunnel without bringing smoke out with it?

A. I had not paid any attention to the smoke on the bridge.

Q. But you saw it there on that occasion?

A. Yes, sir, I saw the smoke there.

Q. Do you mean to tell the jury that you had never noticed when a train came out of the tunnel, that it did not bring smoke behind it and spread over the bridge?

A. I never noticed it pulling the smoke out over the bridge until that train. I hadn't noticed it that day before.

Q. You worked up until dinner time, if I understand you correctly?

A. Yes, sir.

Q. And there wasn't any accident or any trouble there, was there?

A. There wasn't any trouble outside of that.

Q. Up to a dinner time, I am talking about.

Mr. WERTH: One moment, Mr. McCormick, you interrupted the witness. He said there wasn't any trouble except something, but he did not complete his answer, because you interrupted him. The witness said something that there was not any trouble except, and then he stopped. Please let him finish that answer.

A. There wasn't any trouble only that the guard rail that that freight train struck there.

Q. I was talking about before dinner?

A. This was fore dinner.

Q. That the freight train struck the guard rail?

A. Yes, sir.

Q. And knocked it where?

A. Knocked it along between the steel rails and the wood guard rail.

Q. The knocking of that rail off the track there had nothing to do with the accident to Mr. Holbrook; that had not occurred at that time?

A. No, sir.

Q. So that cuts no figure in the case one way or the other, does it?

Question objected to by counsel for plaintiff.

Mr. WERTH: It is not for the witness to say whether it cuts any figure, or not.

The COURT: Ask him if it had any connection with the accident.

Q. Did it have any connection at all with the accident to Mr. Holbrook?

A. No, sir, none that I know of.

62 Q. What was the number of the train that knocked that piece of timber off and put it on the side of the track?

A. I don't know.

Q. Was it No. 92?

A. No, sir.

Q. Was it a double-headed freight train?

A. It was going west.

Q. Was that a double-head freight?

A. It was a double height freight. The engines were backing with coal cars.

Q. It was not either of the trains that happened to be on the bridge at the time that Holbrook was hurt?

A. No, sir.

Q. And therefore it had no connection whatsoever with the accident to Mr. Holbrook?

A. None that I know of.

Q. Now, coming along after dinner, you got back to work about twelve-thirty, didn't you?

A. Yes, sir.

Q. And then the first train that came out was a double-headed freight, wasn't it?

A. Yes, sir.

Q. That was going eastward, wasn't it?

A. Yes, sir.

Q. That train did not hurt him, did it?

A. No, sir.

Q. The track was clear then of everything and everybody, wasn't it?

A. The east bound track was.

Q. That is what I mean. The east bound track so far as everything was clear and there wasn't any obstruction on the track, and there wasn't anybody on the track?

A. On the east bound track there wasn't.

Q. How close were you to Carbaugh at the time that east bound freight train came on to the bridge?

A. I don't know; I never noticed him as we were working around there.

Q. You were working around there together, were you not?

A. Yes, sir.

Q. Did you hear him give a warning at the approach of that train "Clear?"

A. No, sir, I did not.

Q. Well, didn't everybody clear?

A. I did.

Q. You were not working with the gang; you were putting on bolts on some work there that had already been put down, I believe?

A. Yes, sir.

Q. How far was that from the piece of work that the other part of the gang was working on?

A. Probably twenty or thirty feet.

Q. To the east or west?

A. The west; they were to the west of me, and I was to the east of them.

Q. Now, the running of that freight train, or a freight train such as that, would have prevented you possibly from hearing any order that Mr. Carbaugh may have given?

A. Yes, sir.

Q. You cleared the track, however, yourself?

A. Yes, sir.

63 Q. Did you see the train, or did you clear it by direction of somebody, or just because you saw the train yourself?

A. I seen the train. The train was on the bridge then, and I never cleared until I saw it on the bridge.

Q. You cleared it by getting on the flange beam?

A. No, sir, I cleared it on top of the floor beam behind the brackets.

Q. Behind the bracket of the east end of the bridge?

A. Yes, sir.

Q. Did you notice whether or not the other men cleared at that time?

A. I did not notice any of them excepting Carbaugh clearing.

Q. Did you notice that he cleared?

A. Yes, sir.

Q. Did you notice where Holbrook was at that time?

A. I didn't notice where he was at the time.

Q. I am talking about when the freight train came now?

A. No, sir, I did not notice where Holbrook was at the time the freight train came on the bridge.

Mr. WERTH: You said Holbrook, you mean Carbaugh, don't you?

Q. You didn't see where Holbrook was at that time?

A. No, sir. I never noticed him.

Q. After the freight train had come out from the tunnel, going, if I understand you correctly with the smoke enveloping, or cover, or settling upon the bridge, you did not see Holbrook until when?

A. I never noticed him until I seen him come up to that piece of timber.

Q. When he came up to that piece of timber from what place did he come?

A. I didn't notice him, only just noticed him make a step or so.

Q. That piece of timber was put at what point?

A. At what point in the bridge you mean?

Q. Yes, sir.

A. It was a little bit east from the middle of the bridge, to the best of my recollection.



Q. And was that one of the pieces of timber that had been used there for the purpose of framing up the guard rails?

A. Yes, sir.

Q. When he came up to it, from what direction did he approach, and where were you standing with respect to him?

A. I was standing on the floor beam east of him.

Q. Then he was coming towards you, or facing you?

A. I only seen him just make a step over to the middle of the track, in between the rails.

Q. You didn't see him catch hold of the rail?

A. No, sir.

Q. And you didn't see anybody there with him?

A. No, sir.

64 Q. And you don't know whether he went there to take care of the rail, or not?

A. No, sir.

Q. I mean the piece of timber that was there?

A. No, sir.

Q. You did not see him manipulate that at all, or handle it?

A. No, sir.

Q. You simply saw him going in the direction of it?

A. He walked up like he was looking down on it.

Q. How far was he from it when you saw him?

A. He was right at it, he just stepped on over across the rail as I seen him.

Q. How close would he have been to the timber at the time you saw him?

A. He could have been within two or three feet of it.

Q. Now, No. 15, at that point of time, hadn't come, if I understand you correctly?

A. No, sir.

Q. Did you hear No. 15 blow its whistle on the approach to the bridge?

A. I heard the sounding of the whistle.

Q. That turned out to be the sound of the whistle of No. 15, didn't it?

A. I suppose it was.

Q. Well, don't you know it was?

A. I had seen fifteen before I had heard the whistle.

Q. You had seen it?

A. Yes, sir.

Q. And then you heard the whistle?

A. Yes, sir.

Q. Now, is there any reason, if you saw it and heard the whistle, why Holbrook or anybody else on the bridge, could not have seen and heard just what you did?

A. I couldn't see the rest of the men down in there, any further than Carbaugh on the next floor beam to me.

Q. If Holbrook was the man of the size you have described him, could he have seen it and heard it as well as you could? He was a man of good hearing, wasn't he?

A. I suppose so.

Q. Do you know anything to the contrary?

A. No, sir.

Q. Holbrook could have seen the engine coming just as well as you could, couldn't he?

A. If that smoke hadn't hid it from him, he could, but I was up further on the bridge.

Q. How far were you from Holbrook at that time, do you know?

A. I don't know, but when I saw him at the piece of timber I was some fifty or sixty feet from him, I guess.

Q. Now, when No. 15 got on the bridge had the freight train cleared the bridge?

A. No, sir.

Q. It was still on the bridge?

A. Yes, sir.

Q. Do you know whether or not there is a rule of the company requiring people to stay in a place of safety until the bridge is clear?

A. No, sir, I do not.

65 Q. Well, you did stay in a place of safety until it was clear, didn't you?

A. Yes, sir.

Q. Now, when No. 15 came on to the bridge, it came in the way it comes every day, didn't it?

A. Yes, sir.

Q. At its usual rate of speed, wasn't it?

A. It seemed to be about the usual rate of speed.

Q. Just as you have seen it do over and over again?

A. Yes, sir.

Q. Now, just before No. 15 came on to the bridge, had you seen Holbrook?

A. No, sir, I hadn't seen him.

Q. You don't know where he was?

A. No, sir, I don't know where he was.

Q. You don't know whether he cleared the track, or not?

A. No, sir, I do not.

Q. The last time you saw him was when No. 92, or that freight train was approaching and he was stepping up towards that piece of timber?

A. No, ninety-two was the freight train that had crossed the bridge, the engines had, and the cars were pulling the smoke out.

Q. But still, the cars had not cleared the bridge, had they?

A. No, sir.

Q. And that is the last time you saw him?

A. That is the last time I saw him.

Q. You don't know what he was going to do?

A. No, sir.

Q. And you saw him do nothing?

A. I saw him do nothing.

Q. You didn't see him when he was struck at all?

A. No, sir.

Q. You don't know what struck him, or how he was struck?

A. No, sir, I did not.

Q. You don't know where he came from when he was struck?

A. No, sir.

Q. You don't know whether he was at a place of safety down there, as you were, and got up on that bridge and went out there, himself, do you?

A. I do not know where he was at.

Q. And you do not know about the custom of other railroads except the three of which you have spoken, do you?

A. No, sir.

Q. You are not familiar with the customs of other railroads, are you?

A. No, sir.

Q. When No. 15 approached the bridge, you heard a man holler "Railroad?"

A. Yes, sir.

Q. Now, what does "Railroad" mean?

A. It is a warning that they use when there is a train approaching, to clear it.

Q. And after you heard that man call "Railroad," you called "Railroad?"

A. Yes, sir.

66 Q. What did you mean by that?

A. I meant that there was a train coming and for them to clear out; to give warning to the rest of them.

Q. Did the man who gave the first warning of "Railroad" give it in a loud tone of voice so that you and everybody else could hear it?

A. It seemed so. I heard it.

Q. Did you recognize who that man was that hollered "Railroad?"

A. No, sir.

Q. Don't you know Mr. Carbaugh's voice?

A. I don't know whether I would, or not.

Q. At any rate, you hollered yourself, "Railroad?"

A. Yes, sir.

Q. Did you holler it in a loud tone of voice?

A. Yes, sir. I hollered as loud as I could.

Q. How far could your voice have reached the people that were there working on that bridge?

A. It looks like it might have reached across the bridge without the noise of the other train there.

Q. Then the situation was there, when No. 15, the second section, came on to the bridge on one track, the freight train was on the other track?

A. Yes, sir.

Q. And had not cleared?

A. No, sir, it had not cleared.

Q. Now, everybody knew that when those trains come on the track in that condition, that they must get to a place of safety, don't they? You knew it?

A. Yes, sir, I knew it.

Q. And you staid in a place of safety?

A. Yes, sir.

Q. You had often heard the men told not to stay on the track at all before there had been a clearing of the track by the train, hadn't you?

A. I heard Carbaugh several different times tell them to keep a lookout, that there was no flag out.

Q. That instead of sending a flag out, or sending a watchman out, or putting torpedoes down, you heard somebody give the warning of railroad, and you repeated it, if I understand you correctly?

A. Yes, sir.

Q. Would a torpedo, or a flag, or anything else have been a better warning than "Railroad," or was "Railroad" a better warning than that?

A. A flag would have been a better warning if they had been back flagging.

Q. Why would it have been so, if you hollered "Railroad!" in time for the men to clear?

Mr. WERTH: We object to that question. There is no evidence that shows that the warning "Railroad" was made in time.

Mr. McCORMICK: We will show that later on.

67 Q. When the warning was given of "Railroad," didn't everybody on that bridge have time to get off the track?

A. I do not know whether they did, or not. There was very few seconds.

Q. You said a little while ago about thirty seconds?

A. I said about thirty seconds to a minute after I last seen Holbrook until fifteen run.

Q. How long would it take a man to step from the center of the track to get in the clear?

A. It would not take him long, if he wasn't in the smoke and couldn't see where he was going to.

Q. A man who knew where that girder was, whether there was smoke there, or not, could go to it?

A. There is an open space in there, with the exception of those floor beams.

Q. If the warning was given in time to clear, that warning was as good, if not better, *when* a torpedo, or a flag, or anything else, wasn't it?

A. If it had been given in time, it was all right.

Q. You distinctly heard the warning. Now, how many seconds was that before train No. 15 reached the bridge?

A. When I heard the warning, I looked and seen fifteen and hollered, and I just dodged back behind the bracket and fifteen seemed to strike the bridge about that time.

Q. You had heard this warning given by the other man before you gave yours?

A. Yes, sir.

Q. Now, you say when you gave your warning, you stepped behind the bracket?

A. Yes, sir.

Q. But the other man had given his warning before you did?

A. Yes, sir.

Q. How much time had elapsed between the time the man gave his warning and No. 15 struck the bridge? I just want about the time. I don't want you to be mathematically certain about it?

A. Five seconds or ten, may be.

Q. There was plenty of time for the men to have gotten out of the way, wasn't there?

A. If he was right at a place where he could get out of the way, he could have gotten out of the way.

Q. He could have gotten to the floor beam without any trouble, couldn't he?

A. I do not think so, if he had been any distance from it.

Q. How far could he have possibly been from any floor beam there, from the nearest floor beam; he must have been a very short distance from it, wasn't he?

A. I don't know how far he was from it.

Q. Are they not about nine or ten feet apart?

A. I said I do not know how far they are apart.

68 Q. But you can give an opinion; you can give me some idea about it, can't you?

A. Probably twenty or thirty feet.

Q. You think these floor beams are twenty or thirty feet apart, or are they between nine and ten feet part?

A. It seems to me that they were about fifteen or twenty feet apart, anyway.

Q. Then it would depend upon where the man was standing whether he could have gotten out of the way when he first heard the first call of "Railroad?"

A. Yes, sir.

Q. When you heard the call of "Railroad," did you see where Carbaugh was?

A. Yes, sir.

Q. Who was with him, or who was he with?

A. I did not see anyone with him.

Q. Wasn't he with a young man named Henkle?

A. I did not see Henkle.

Q. How far west of you was Carbaugh?

A. On the next floor beam to me.

Q. How far was that?

A. As I said, just guessing at it, fifteen or twenty feet apart.

Q. And you saw nobody with Carbaugh?

A. No, sir.

Q. Do you know whether Carbaugh had seen that everybody was off the track and the track was clear before he, himself, got off; wasn't he the last man to get off?

A. I don't know about that. He was standing on that floor beam when I seen Holbrook step up to this piece of timber.

Q. How far was Holbrook from Carbaugh at the time you saw him step up?

A. He was from fifteen to twenty feet, I guess.

Q. Did you see anybody else on that track?

A. No, sir.

Q. Was the track clear, so far as you saw?

A. So far as I saw it was clear, with the exception of that one piece that was on there when the smoke hid it from me.

Q. That was the smoke that came from that freight train.

A. Yes, sir.

Q. When you say that you did not hear Carbaugh give any orders on the approach of the freight train to clear the track, you do not mean to say that he did not give them, but you did not hear them?

A. No, sir, I did not mean to say he did not give them, but I did not hear them.

Q. He may have given them and you not heard them.

A. I don't know anything about that.

Q. You were engaged in your work away from the gang, and then you were confused there by the noise of the train?

A. Yes, sir.

Q. Now, this is supposed to be a picture of the bridge, and this is the east end of the bridge, and you were standing on the floor beam—now, where were you standing? Please indicate it on this picture.

69 A. I do not know whether I was standing behind this first bracket, or that second one.

Q. You were standing behind one or the other of those brackets, were you?

A. Yes, sir. This is the east end of the bridge, and this is the north side.

Q. Yes. You say that the tunnel is right here at the other end; you can see the tunnel there, can you not?

A. Yes, sir.

Q. And here is the east end of the bridge, there are the brackets, and you were standing on one or the other of these two brackets?

A. Yes, sir.

Q. Where was Holbrook standing when you saw him step off and go up on the track?

A. If I was standing on this one here and Carbaugh was on that one, Holbrook was right in here somewhere (indicating).

Mr. WERTH: Let me call your attention to one matter, Mr. McCormick: He never said that he saw him step off and go back.

Q. Did you see him when he stepped off and go back on the track?

A. No, sir.

Q. You only saw him after he got on the bridge?

A. When I saw him he stepped across from here (indicating) over to the center.

Q. After he had gotten on the bridge?

A. He was on the bridge; I never seen him off the bridge.

## Redirect examination.

By Mr. WERTH:

Q. Mr. Harrison, were those two pieces of timber that were across the west bound track, and the other timber on top of those, such an obstruction as would prevent the passage of a train at its usual and regular speed with safety?

A. Yes, sir, I would think so.

Q. I do not understand what you mean by your answer. Do you mean to say that the train could pass with these obstructions on there with safety?

A. No, sir.

Q. Then it was an obstruction to the safe passage of trains, was it?

A. Yes, sir.

Q. Now, I will read you from a rule book of the Norfolk & Western Railway Company, Rule 616, I mean the rule book filed  
70 by the defendant company in this case, which is found on page number eighty and is as follows:

Mr. McCORMICK: We did not file that book.

Mr. WERTH: Yes, sir, you did. I got it in the papers that you filed.

Q. Now, I will read you this rule 616: "Any work that interferes with the safe passage of trains at full speed is an obstruction and must not be attempted without full protection in both directions." What is meant by the words "Without full protection in both directions," under that rule?

Question objected to by counsel for defendant.

Mr. McCORMICK: That is a matter of construction by the court and not by the witness, and the rule speaks for itself. Further, I would like to call your Honor's attention to the fact that the witness said he never saw the rules and don't know what they were. I understood you to say that, Mr. Harrison?

WITNESS: I never saw the rule book of the Norfolk & Western Railway Company.

Objection sustained.

Q. I will add the words to the same question "If you know?"

Question objected to by counsel for defendant.

The COURT: I think from the limited scope of his employment, and what we have seen of him, he is not qualified to give an opinion on the meaning of those words.

Mr. WERTH: Then, I will ask him this question, Do you know the meaning of the words "Without full protection in both directions," as used in this rule 616?

Question objected to by counsel for defendant: Objection sustained.

Court adjourned until Monday morning, June 23, 1913, 9:30 A. M.



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MONDAY, June Twenty-third, 1913.

(Morning Session.)

Court reconvened at 9:30 o'clock A. M., pursuant to adjournment on Saturday.

The plaintiff having begun the introduction of her evidence in chief, but not having concluded same, upon adjournment Saturday, resumed the introduction thereof, as follows:

W. M. HINKLE, for Plaintiff.

Direct examination.

By Mr. WERTH:

Q. Where do you live, Mr. Hinkle?

A. Graham, Va.

Q. You will have to speak louder than that.

A. Graham, Va.

Q. For whom are you working at this time?

A. What did you say?

Q. For whom are you working at this time, I asked?

A. C. W. Anderson.

Q. For what company are you working?

A. The N. & W.

Q. For whom were you working on January 4, last?

A. C. W. Anderson.

Q. For the same company?

A. Yes, sir.

Q. What kind of work were you doing in January, 1913?

A. We were working on the bridge.

Q. What force did you belong to? What were you called? What occupation did you have?

A. Carpenter.

Q. Do you mean by that bridge carpenter?

A. Yes, sir.

Q. And C. W. Anderson was your foreman there, I believe?

A. Yes, sir.

Q. Who usually went out with you to work as foreman, C. W. Anderson, or —

A. (Interposing.) Yes, sir.

Q. (Completing question.) —Mr. Carbaugh?

A. Well, he went out, too.

Q. Well, who went out generally, Mr. Carbaugh or Mr. Anderson?

A. Mr. Anderson.

Q. How often did Mr. Carbaugh go out?

A. Every day.

Q. How often would he go out as foreman?

A. Whenever Mr. Anderson was off on other business a day on other work for the railroad.

Q. How often was that?

A. Well, once or twice a month, may be.

72 Q. Not oftener?

A. Well, probably.

Q. During the last five months, prior to January, 1913, who went out with you oftener as foreman, Mr. Anderson or Mr. Carbaugh?

A. Mr. Carbaugh, I think.

Q. Where did you go to work January 4, 1913? I mean, upon what bridge did you go to work?

A. I forget the number of the bridge.

Q. In order to refresh your memory, I will ask you if it was bridge 899-A, near Pando, W. Va.?

A. Yes, sir, that is the bridge.

Q. By whose directions did you go to work on that bridge on that day?

A. Mr. Carbaugh's.

Q. How many men went to work on that bridge on that day, outside of the foreman?

A. About six.

Q. Name them over.

A. Well, me, Bob Porter, Pierce Walters, Mr. Holbrook, John Hinkle and Harrison.

Q. A. L. Harrison?

A. Yes, sir.

Q. Are all those men in attendance on this court as witnesses?

A. Yes, sir.

Q. Mr. Holbrook isn't here, is he?

A. No, sir.

Q. All of the others are?

A. Yes, sir.

Q. At what time did you go to work on that bridge that morning?

A. I expect it was ten or eleven o'clock.

Q. You say you went to work on the bridge at ten or eleven o'clock?

A. Yes, sir.

Q. What time did you go to work that day?

A. At seven o'clock.

Q. Where did you go to work between seven o'clock and ten or eleven o'clock?

A. We loaded some ties.

Q. Where?

A. There at Pando.

Q. What on?

A. A flat car.

Q. Where were they to go?

A. I don't know.

Q. Then you went to work on the bridge about ten or eleven o'clock?

A. Yes, sir.

Q. What did you all go to doing on the bridge, I mean what sort of work?

A. Well, we went to putting on guard rails, some of them did.

Q. What did the others do?

A. Well, some of us robbed the bridge, taken the bolts out of it, and put in new pieces of guard rail.

Q. Just what do you mean by robbing the bridge?

A. Well, taking up the old piece of guard rail and preparing to put in a new piece.

Q. Now, tell me what occurred after you went to work on the bridge, and I mean by that what occurred out of the way, or that was unusual, if anything?

A. I don't understand your question.

Q. Tell me if anything unusual or out of the common occurred on the bridge after you went to work there, and, if so, what the first thing was that did occur?

Defendant's Objection.—Counsel for defendant object to the question and say that a proper form of question would be to ask the witness to tell exactly what did occur.

The COURT: As I take it, counsel for plaintiff does not want the witness to go over every minor incident that took place there, but simply wishes him to state anything that occurred out of the ordinary. Objection overruled.

Defendant excepts.

A. Well, nothing unusual.

Q. In order to refresh your memory I will call your attention to the passing of a coal train over that bridge after you began work on it, and I now ask you to tell the jury if there was anything unusual that occurred in connection with the passing of that coal train?

The COURT: Before dinner, do you mean?

Mr. WERTH: Yes, before dinner.

Q. (Continuing:) And if there was anything, tell the jury exactly what occurred.

— (A pause without response.)

Q. Do you understand my question?

A. Yes, sir.

Q. All right, I would like for you to answer it, please.

A. Well, we went to putting on guard rails.

Q. There was not anything unusual or out of the common in your putting on a guard rail, was there?

A. (No response.)

Q. Do you understand that question?

A. (A pause without response.)

The COURT: Mr. Werth, just call the witness' attention to the incident that you wish to ask him about.

Q. I refer to the time when the coal train was being pushed by two engines on the west-bound track and when they went across the bridge and struck a piece of timber and like to have caught four men?

A. No, sir.

74 Q. Do you recall that incident?

A. I don't remember that.

Q. Are you the father of J. J. Hinkle?

A. Yes, sir.

Q. He was there, was he not?

A. Yes, sir.

Q. Now, Mr. Hinkle, in order to refresh your memory, I will ask you if that coal train did not like to knock your son into the river?

A. No, sir.

Q. Do I understand you now as telling the jury that nothing unusual occurred in connection with the coal train and the putting down of these guard rails?

A. No, sir.

Q. Nothing whatever?

A. No, sir.

Q. Will you tell the jury if that coal train struck the piece of guard rail that was lying on the bridge and lengthwise with the track and knocked it some distance?

A. Yes, sir.

Q. Is that a common occurrence for a train to come along and find a piece of timber on the track and knock it twenty feet? Is that an every-day and common occurrence when Mr. Carbaugh is foreman?

A. No, sir.

Q. You do remember that?

A. Yes, sir.

Q. Tell the jury how it happened that the coal train came along there and found that piece of timber on the track and struck it and knocked it twenty feet?

Counsel for defendant object to the question because this witness has not said the coal train knocked a piece of timber twenty feet.

A. No, sir; I didn't say that it knocked it twenty feet.

Q. I will ask you to tell the jury how far it did knock it. You say that it struck it?

A. It slid it may be eight or ten feet.

Q. You gave the railroad company a written statement of the occurrences on that bridge on January 4, 1913, did you not?

Defendant's Objection.—Counsel for defendant object to the question because irrelevant and immaterial, and say that it is immaterial whether the witness gave a written or a verbal statement to counsel or the defendant; that the question here is what are the facts.

Counsel for plaintiff replies that this question is asked as a means of laying a foundation for moving the court for permission to examine this witness as a hostile witness.

Objection overruled.

Defendant excepts.

75 A. Well, my understanding was that the statement I made was in regard to Mr. Carbaugh's statement.

Q. Do I understand you to mean by that that Carbaugh made a statement, and that you signed his statement?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir.

Q. Then, I understand from your answer that the foreman of the bridge crew made a statement for the railway company and that you signed the foreman's statement and adopted it as your own; is that correct?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir.

Q. I will ask you if young Mr. Stallard, a relative of the widow of Tom Holbrook, requested you to give the plaintiff's counsel your statement; if he did not go to you and ask you to come to plaintiff's counsel and make him a statement, and if you did not fail to come?

Defendant's Objection.—Counsel for defendant object to the question and say that this evidence is evidently for the purpose of prejudicing the minds of the jury and is improper; that the witness has a right to go to counsel, or not, as he pleases.

Counsel for plaintiff replies and states that the purpose of the question is to lay a foundation to examine this witness under the statute.

Objection overruled.

Defendant excepts.

76 Q. The court says that the question is a proper one, and I will get you to answer it.

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir.

Q. Did you go?

A. No, sir; I did not go.

Q. Are you still in the employ of the railway company?

Plaintiff's Motion to Examine Witness as a Hostile Witness.—

A. Yes, sir.

Counsel for plaintiff now asks leave of the court to examine this witness under the statute as an adverse witness.

Counsel for defendant object, and state that the witness has shown more ignorance than hostility; that the slowness with which he responds to questions propounded by counsel for plaintiff is not unusual, because when counsel for defendant were interrogating him in their office as to this case he showed a similar situation.

The COURT: For the present I will sustain the objection, and

suggest that counsel for plaintiff go a little further in the examination of this witness, because the court has not yet exactly placed him.

Q. Did you hear the engineer of that coal train blowing a signal as he approached that bridge and after he came——

The COURT: Do you mean in the forenoon, Mr. Werth?

Mr. WERTH: Yes, sir.

Q. I mean the coal train going west on the west-bound track with the engines pushing the cars in front?

A. Yes, sir; I remember.

By the COURT: The one that struck the piece of timber in the forenoon, are you talking about, Mr. Werth?

Mr. WERTH: Yes, sir.

77 Defendant's Objection.—Counsel for defendant object to the question and the answer thereto because immaterial and having nothing to do with the issues in this case.

Objection overruled.

Defendant excepts.

Court's Instruction to the Jury.—By the COURT: Gentlemen of the jury, in regard to the incident in the forenoon of the coal train striking the piece of timber on the bridge, this evidence is allowed to go in for the purpose of showing, if it seems that it does so, or that it tends to show, that the foreman, and also in the same way the members of the bridge crew, knew of the danger the men were in while working on the bridge. It is not admitted on the theory that if there was negligence in the forenoon, that therefore you may properly infer there was negligence in the afternoon. It is only admitted for the purpose, in so far as it tends to show, that there was notice to the foreman, and the bridge crew as well, of the danger they were all in there under the circumstances.

Q. What signals did it blow

A. It blowed signals, but I ain't well enough acquainted with railroad signals to understand the whistle.

Q. How long have you worked for the railroad on the bridge force?

A. I went to work on the twelfth day of last August.

Q. Is the town of Graham, in which you live, a railroad town?

A. Yes, sir; we have a railroad through there.

Q. Now, describe to the jury the nature of the signals which you heard; whether you know their significance or not, what kind of signals did he blow?

A. I have not been living in Graham or along the railroad but about five months.

Q. Well, describe the signals that you heard that engineer blow with reference to whether or not they were long——

A. (Interposing.) They were short blasts, as well as I remember.

Q. Were they fast?

A. (A pause without response.)

Q. Were they blown rapidly?

A. Well, they were blown pretty rapidly.

Q. Do you know what signal is given which is called an alarm for stock or persons on the track?

A. No, sir.

Q. Don't you know what a stock whistle signal is?

A. No, sir.

78 Q. That is a succession of very rapid blasts of the whistle. Don't you know what that means?

A. No, sir.

Q. How many times did the engineer blow; how many of the short whistles that you described?

A. I believe that he blowed twice.

Q. Is that all that he did blow, just twice?

A. All that I remember hearing him blow.

Q. In order to refresh your memory, I will ask you if he did not blow short, rapid blasts of the whistle very rapidly and for a considerable length of time, and so fast that you could not count them?

A. The west-bound train?

Q. I refer to the train and the only train of which I have spoken since I began to examine you—the coal train going west on the west-bound track after he came around the curve and in sight of you men on the bridge?

A. I don't remember hearing him over twice.

Q. Didn't you understand at the time that you heard those whistles what he was blowing for?

A. He blowed to let us know that he was coming, I guess, to get off the bridge.

Q. He was blowing at the situation he saw on the bridge, was he not, and did not you so understand it?

Defendant's Objection.—Counsel for defendant object to the question because the witness has not stated what counsel is putting into his mouth. The witness has already explained that the blast of the whistle was blown to warn the men that the train was approaching. If counsel can get a more correct answer than that from any witness, I do not know how he will proceed. The witness cannot by any possibility know what was in the mind of the engineer who gave the blast of the whistle, and may only state the fact—what he heard. Furthermore, as to what the engineer blew for is immaterial, irrelevant and inadmissible.

Objection overruled.

Defendant excepts.

A. He was blowing, but whether he was blowing for the situation on the bridge, or not, I don't know.

Q. At the time that that coal train came around the curve, what was your boy doing?

A. Me and him had hold of the end of the guard rail.

Q. Who else had hold of the other end of the guard rail?

A. Mr. Holbrook and Mr. Walters.

79 Q. The four of you then had hold of the guard rail, and what were you doing with it?



A. We were carrying it out, fixing to frame it.

Q. Were you off or on that bridge?

A. Off or on the bridge?

Q. Yes.

A. We were on the bridge.

Q. Were you off or on the west-bound track on which that train was coming?

A. We got off——

Q. (Interposing.) You do not understand my question. At the time ——

Mr. McCORMICK: Just let the stenographer repeat the question to the witness. (Which is done.)

A. We got off on the west-bound track.

The COURT: Suppose you just ask the question again.

Mr. WERTH: Yes, I do not think he understands me.

Q. You seem to have misunderstood my question. At the time that the engineer blew those short whistles where were you and your son and Holbrook and the other men you mentioned with reference to the east or west-bound track?

A. Mr. Holbrook and Mr. Walters, they had got off—they had laid their end of the guard rail down and gotten off of the bridge.

Q. When you were carrying that guard rail in on the bridge, did you carry it on the west-bound track or on the east bound track?

A. Carried it in on the west-bound track.

Q. How far on the bridge were you at the time the engineer blew that whistle, or those whistles?

A. Something like the middle.

Q. And you were on the west-bound track?

A. Yes, sir.

Q. Who of the four men that you mentioned had the front end of that guard rail?

A. Mr. Holbrook and Mr. Walters.

Q. Pierce Walters?

A. Yes, sir.

Q. He is here, is he not?

A. Yes, sir.

Q. What did the men do—or, first, what two men had the rear end of that guard rail?

A. Me and my son.

Q. How close was that coal train to you and your son when you crossed the track?

A. Within fifty feet, as near as I can guess.

Q. You had your back to the coal train, did you not?

A. Yes, sir.

Q. All the men that had hold of that guard rail had their backs to the approaching train, I suppose?

A. Yes, sir.

80 Q. When that engineer commenced blowing those whistles, what did the four men that had hold of that guard rail do?

A. As well as I remember, they laid their end down before it whistled.

Q. What did they lay it down on?

A. They laid it down on the end of the tie.

Q. On what track, the east-bound or the west-bound?

A. On the west-bound.

Q. For what purpose did they lay it down? Had they gotten to the place where they intended to lay it down?

A. Yes, sir.

Q. What were they going to do with it at that place?

A. They were going to fix to frame it to put it in the bridge.

Q. How would they do when they went to framing it?

A. Well, they would lay it down on the heads of the ties, and in between the ties, and we would make marks where we would saw out daps in it to fit down over the ties.

Q. That is where they would lay it when they wanted to find out where they would put the daps in it?

A. Yes, sir.

Q. And after they did that, where would they lay it in order to cut out or mortise out those daps? Where did they lay it on that bridge, I mean?

A. They would lay it on the track, across the track.

Q. Do you mean by that answer to say that they would lay it between the rails of the west-bound track?

A. Yes, sir; that is the track we were working on.

Q. What would they lay it on?

A. Well, what we call framing blocks.

Q. Describe those framing blocks; what were the framing blocks laid on?

A. On the rails.

Q. On the rails of the west-bound track?

A. Yes, sir.

Q. Well, how many framing blocks would you lay down to frame the guard rail on?

A. Two.

Q. One at each end?

A. Yes, sir.

Q. How large were those framing blocks?

A. Well, we have different blocks, you know. I think those were about six by seven.

Q. What sort of timber were they made out of?

A. Pine.

Q. How long was the guard rail that you were putting down there that day?

A. Oh, I guess it would be about twenty feet.

Q. How big was that?

A. I guess that would be about six by seven.

Q. Was it dry or green timber?

A. Well, it was dry timber.

Q. How much would it weigh?

A. Well, there were different pieces, you know. You

might get hold of a light piece, and you might get hold of a heavy piece. This here would weigh, I guess, may be 200 or——

Q. How would you carry that guard rail? You said two men would get hold of it at each end. Now describe the manner in which you would carry it?

A. Well, what we would call log hooks, we would take and just hook down over the timber.

Q. Describe those hooks to the jury; what sort of instruments are they?

A. Well, a piece of iron about that long, I reckon (indicating from tips of finger near elbow), with a hook on the end of it. That would hook right down into the piece of timber. That had handles on it up here for you to catch hold of.

Q. Would there be one hook for each man?

A. The hooks were together.

Q. Would there be one hook for each of the four men, or would two men have hold of one hook?

A. There were two hooks on each of the lug hooks, as we call them; two hooks.

Q. Then, what would the men have hold of? The hooks would have hold of the piece of timber, and what would the two men at the end of the piece of timber have hold of?

A. They would have hold of the handles of the lug hooks.

Q. Can you draw on a piece of timber a diagram showing how that lug hook is made?

A. I might make a sort of one.

Q. Would all the men when they were walking with that piece of timber be together, or would two men be at each end, one the opposite the other, and across the timber?

A. Yes, sir.

Q. And with the piece of timber between them?

A. Yes, sir.

Q. Now, when you got to where you expected to lay the guard rail down, you say Holbrook and Walters laid their end down?

A. Yes, sir.

Q. Did they lay it down on the framing blocks that were laying across the tracks?

A. No, sir.

Q. Had that guard rail been just marked on the cross ties for the daps?

A. No, sir.

Q. Then you laid it on the ends of the cross ties for the purpose of marking it, did you?

A. Yes, sir; that is what we——

Q. (Interposing.) Or what you were going to lay it on after that, was on the framing blocks that were across the rail?

A. Yes, sir.

82 Q. At that time were those framing blocks across the rails?

A. No, sir.

Q. Where were they?

A. They were laying out on the heads of the ties.

Q. At that place?

A. No, sir.

Q. What part of the bridge were they laying on, how far from there?

A. They were on the east end, and I reckon about twenty or thirty feet.

Q. Had you framed any guard rails that morning up to that time?

A. No, sir.

Q. That was the first guard rail then that you had framed?

A. That morning?

Q. That morning, I mean.

A. Yes, sir.

Q. You had not yet brought your framing blocks in on the track?

A. No, sir.

Q. When Pierce Walters and Tom Holbrook laid their end down had the engineer yet blown that whistle?

A. I don't remember whether he had blown, or not.

Q. But he had blown before you got your end down, as I understand?

A. Yes, sir.

Q. What did Pierce Walters and Tom Holbrook do after they had laid their end down?

A. They stepped over on the east-bound track.

Q. And left who with the guard rail, anybody?

A. Me.

Q. Anybody else?

A. I was the last men to leave the guard rail.

Q. When they left and stepped on the east-bound track, you and your son yet had hold of the guard rail, if I understand?

A. After my son had got on the other track I went in behind him. I was the last one out.

Q. When you and your son laid down the end of that guard rail, where did you lay it down?

A. We laid it down, as well as I remember—I think we had it sort of hung up on the old guard rail that laid there.

Q. When you and your son laid your end of that guard rail down, instead of laying it on the ends of the ties you laid it on top of the old guard rail by the side of the rail, did you not?

A. On the outside of the guard rail.

Q. Was the new guard rail that you and your son had helped to bring in there and which you say laid on top of the old guard rail, was it resting on top of it?

A. No, sir.

Q. Where was it resting then?

A. Resting on the bridge.

Q. What do you mean by "resting on the bridge"?

A. Well, that is the place that we had left it at, you know.

83 The COURT: Do you mean on the ends of the ties, outside of the guard rail?

WITNESS: Yes, sir.

Q. If it was left on the ends of the ties on the outside of the guard rail, explain to the jury how that train happened to hit it?

A. (A pause without response.)

Q. The train did hit it, didn't it?

A. Yes, sir.

Q. How did it hit it if you left it on the ends of the ties, outside of the rail?

A. When the other fellows left I aimed to turn it over, and it kind of turned up on its edge, and that is the way the engine got hold of it.

Q. When it turned up on its edge, wasn't it resting upon the old guard rail to some extent?

A. Yes, sir, as well as I remember now, it was.

Q. It was up on the old guard rail high enough to obstruct the passage of that coal train, and was struck by the coal train; is that correct?

A. Yes, sir.

Q. Why did you leave it in that position?

A. Well, the engine was coming, approaching, and I got out of the way of the engine.

Q. If I understand your answer correctly, you mean to say that you left it because you did not have time to fix it, is that right?

A. Yes, sir; that is right.

Q. What was the next thing to occur on that bridge out of the ordinary, and unusual, if anything, after the occurrence you have just mentioned?

A. After dinner or before dinner?

Q. I asked, what was the next thing, no matter whether before or after dinner?

Defendant's Objection.—Counsel for defendant object to this question because immaterial and irrelevant, and in order to get the matter clear and have no confusion, ask the question, is all this evidence directed to what happened in the forenoon?

Counsel for plaintiff replies that the witness has said this occurred in the forenoon.

Counsel for defendant then asks counsel for plaintiff to state whether the next occurrence to which he now refers was in the forenoon or in the afternoon.

Counsel for plaintiff replies and says that he is asking the witness to state the next occurrence, no matter when it happened, if it happened there at that bridge the day of the accident.

Counsel for defendant now ask the stenographer to read the last question propounded by counsel for plaintiff to the witness and which has not yet been answered, and to which objection was made.

(Which is done.)

Counsel for defendant insist upon their objection to this question, because the witness may not be able to understand from the question what is meant; and at this point counsel for defendant make a general objection to all of the testimony on this point, and the court is asked to strike it out.

Objection and motion overruled.

Defendant excepts.

Q. Where was Foreman Carbaugh at the time you four men were bringing in that guard rail?

A. He was there.

Q. Where?

A. Right there on the bridge.

Q. Did he see this occurrence that you described?

A. Yes, sir.

Q. Did you see any other train going west on the west-bound track in the forenoon—passenger train?

A. I don't remember.

Q. Do you know what train No. 15 is?

A. No, sir; I don't know the numbers of the trains.

Q. Well, without regard to the number, do you know that there was a morning train going west over that track to Columbus?

A. Yes, sir.

Q. Do you know that that train was called No. 15?

A. Yes, sir.

Q. Did you see that train pass that morning?

A. Yes, sir.

Q. Was it before or after this occurrence that this coal train came along, and which you have described?

A. I believe it was before.

Q. You had been on the Pocahontas division as a bridgeman since August prior to this accident, how much of your work had been on that branch of the division from Bluefield to Williamson; the most of it, or a part of it, or how was it?

A. Well, it was all along the road.

Q. Well, I do not know what you mean by all along the road. You know what the Pocahontas division embraces for bridgemen?

A. No, sir.

85 Q. Well, it embraces from Bluefield to Norton in one direction, and from Bluefield to Williamson, W. Va., in another. Now, was the most of your work from August, 1912, to January, 1913, from Bluefield to Williamson, or from Bluefield to Norton?

A. From Bluefield to Williamson I would say.

Q. No. 15 is a train that runs from Bluefield west to Williamson, and on to Columbus, is it not?

A. (A pause without response.)

Q. I will get the stenographer to read the question. (Which is done.)

A. I don't know about No. 15, but No. 17 does.

Q. Haven't you got the numbers just reversed, and does not No. 17 run from Bluefield to Williamson and stop there, while does not No. 15 run from Bluefield to Williamson and on to Columbus? Isn't that right? There is no question in dispute about that.

A. (A pause without response.)

Q. Well, what do you say about it?

Mr. SMITH: Let the witness say whether he knows, or not.

Mr. WERTH: He does not seem to be able to tell us.

Mr. McCORMICK: Give him time, he is a slow witness.

A. I answer, yes, sir.

The COURT: Do you know that 15 was a through train that did not end at Williamson?

WITNESS: Yes, sir, it stops there.

The COURT: That it did not end its trip there?

WITNESS: No, sir, I didn't know it.

Q. I am trying to get at the fact that No. 15 was a train going west over the track from Bluefield on towards Williamson every morning. That is what I am trying to get at; isn't that true?

A. Yes, sir.

Q. About what time does it pass, or is it due at Pando, or rather the next station west of Pando, Davy?

A. I don't know, sir.

Q. You stated that it passed over that bridge, and that it passed over the bridge the morning before the occurrence of the coal train. Did it carry any signals, or not?

A. Yes, sir; or, that is, the old men that was acquainted with the signals said so.

86 Q. It carried signals for what?

A. For second fifteen they called it.

Q. Was Mr. Carbaugh there when No. 15 passed that morning on the bridge?

A. Yes, sir.

Q. Well, after you had gone to dinner and returned to the bridge, what occurred on the bridge?

A. After we had gone to dinner?

Q. Yes.

A. Do you mean when we came back to work?

Q. Yes, of course.

A. Well, we went to work again at the guard rail.

Q. Well, was that all that occurred; that you went to work at the guard rail? Is that everything that occurred?

A. (A pause without response.)

Q. I have asked you to tell the jury what occurred after you went to work after dinner. Do you understand the question?

A. We went to work at the guard rail.

Q. Is that all that occurred?

A. Me and another fellow went on to robbing the bridge, to taking the bolts out.

Q. I suppose that is all that happened there, is it?

A. That is all I remember.

Q. Do you know whether Tom Holbrook got killed there that day?

A. Yes, sir.

Q. In order to refresh your memory, do you recall that a freight train passed going east on the east bound track just before Tom Holbrook was hurt? Do you recall that fact?

A. Yes, sir.

Q. What train was that?



A. They called it 92.

Q. Do you know what 92 is, with reference to its being a local freight or a fast time freight?

A. No, sir. I suppose it is a fast time freight.

Q. It was No. 92, wasn't it?

A. That is what they told me.

Q. What is there just west of that bridge, open country, or what?

A. A tunnel.

Q. How close is the tunnel to the west end of the bridge, about?

A. Oh, I think it would be twenty or twenty-five feet.

Q. Well, when the train comes out of the tunnel and especially if it is a long double-header train, what effect does it have on the smoke that has accumulated in the tunnel as the train passes through?

A. Well, the smoke comes out of there and it fogs the bridge a right smart.

Q. Does it always do that so far as your observation has been?

A. Yes, sir.

Q. What happened when No. 92 pulled out of that tunnel and pulled on that bridge with reference to smoke coming out  
87 and settling over the bridge?

A. Well, the passenger train came along and killed Mr. Holbrook.

Q. You don't seem to have understood my question aright. I will ask the stenographer to read it. (Which is done.) You will observe my question now is with reference to smoke coming out of the tunnel and settling over the bridge?

A. (A pause without response.)

Q. Did 92 pull smoke out of the tunnel, and did it, or not, settle over the bridge?

A. Yes, sir.

Q. Where were you on that bridge at that time, before 92 had covered it up with smoke?

A. I had got down in between the girders, I think, on the west bound track.

Q. How about when you did that? You did that after No. 92 had come out and the smoke had covered the bridge, didn't you?

A. (A pause without response.)

Q. My question was, where were you working on the bridge when No. 92 came out of the tunnel and before the bridge was covered up with smoke?

A. I was down about middle ways of the bridge.

Q. What were you doing?

A. Well, me and a fellow by the name of Porter was taking some bolts out of the old guard rail to prepare for another.

Q. What sort of bolts do they use to put down those guard rails with? Just describe those bolts to the jury.

A. Well, it is a bolt about that long, I reckon. (Indicating by again measuring on arm from tips of fingers to somewhere near the elbow.)

Mr. McCORMICK: Just describe the length of that bolt so that

the stenographer may get it down in the record. You measured it on your arm, but that is not getting it in the record. About how many inches in length was it?

WITNESS: Well, some of them are ten and some twelve inches, but I believe we were working with twelve inch bolts that day, as well as I remember.

Q. Well, now go ahead. What is on each end of them?

A. Sir?

Q. What is on each end of the bolt?

A. Well, there is what we call the head of the bolt.

Q. What is on the other end?

A. A nut.

Q. To screw on it?

A. Yes, sir.

Q. Were they the same kind of bolts that were in the old guard rail?

A. (A pause without response.)

88 Q. Did you use the same bolts that were in the old guard rails when you took them out?

A. I don't remember whether they did, or not. I never used any in there we got out.

Q. Tell the jury how you went about getting the bolts out of the old guard rails for the purpose of taking the old guard rail up?

A. Well, as a general thing a man goes along with a wrench and another man on top, and if the bolt turns we hold the top of the bolt so as to get the nut off.

Q. You mean that the wrench unscrews the nut from the lower end of the bolt, underneath the cross-tie; is that right?

A. Yes, sir.

Q. How would he get at a bolt under the cross-ties? Supposing a bolt to be between the floor beams of the bridge, and not at the floor beams, how would he get under there to get the nut off?

A. I have reached down under it and taken them off, and I have got down on a scaffold and gotten them off.

Q. Isn't it usual to have a swinging scaffold swung under bridge to take those bolts off? Is that usual, or not?

A. Yes, sir.

Q. That is the usual way of taking them off?

A. Yes, sir.

Q. Did you have any swinging scaffold on this occasion?

A. No, sir.

Q. You say you have reached under there and taken them off. Can you reach under there when you are standing up?

A. No, sir.

Q. How would you do in order to reach under there?

A. I would lay down.

Q. What would you lie down on?

A. I would lay down on the ties and the guard rail, or whatever is a convenient place to get to it.

Q. Do you mean by that answer to say that you would lie down on the tracks; do you mean that, or not?

A. No, sir.

Q. What do you mean by the answer "No sir?" Would you lie down on the track, or what would you lie down on if you did not lie down on the track?

A. You would get over between the rails, I reckon, to be on the track.

Q. Suppose, Mr. Hinkle, the west bound track was right along here and this was the outside rail; how far beyond the rail would the end of the tie extend?

Mr. McCORMICK: You mean on the bridge?

Mr. WERTH: Of course.

A. About twenty inches. Some of them are and some of them ain't.

89 Q. How far beyond the wooden guard rail would the end of the tie extend?

A. Oh, eight or ten inches. I never did measure it.

Q. The bolt would be through the wooden guard rail and the tie, if I understand you correctly?

A. Yes, sir.

Q. The nut on the lower end of the bolt and under the tie would be a distance of about ten inches in from the end of the tie, is that correct?

A. (A pause without response.)

Mr. WERTH: I wish you gentlemen would let me have one of your photographs that you used during your opening statement.

Mr. SMITH: Here is one of them.

Q. The nut on the end of the bolt, shown on this photograph, would be at the same point under the tie that the head of that bolt is at on top of the guard rail, would it not?

A. (A pause without response.)

Q. I mean, Mr. Hinkle, wouldn't the nut on the lower end of the bolt be straight down under the head of the bolt?

A. Yes, sir.

Q. In here is an open space, I believe (indicating on photograph). There is nothing between that space and the river below, is there?

A. No, sir.

Q. How would you reach over, as you have said, to get the nut off the end of the bolt? You said you could not do it standing up, but you would lie down. Where would you lie down? Show us on this photograph.

A. I would lie down sort of this way and put my hand this way (illustrating).

Q. Which way would your feet be? Which way would your body be extended; at right angles with the guard rail or parallel with the guard rail? I mean by that, this way, or that way?

A. I would be straight with the guard rail.

Q. Was that the way you got the bolts off that day?

A. No sir, I don't think we had taken off any bolts. We hadn't gotten off any bolts. We had some already off.

Q. Haven't you just stated a little while ago that you and another man were taking off bolts, robbing the bridge, as you called it?

A. We were taking them out.

Q. That is what I have been talking about all the time. I mean, all the time I have been holding that photograph before your eyes. That is what I was asking you about, wasn't it?

A. Yes, sir. But I thought you aimed for me to say about taking them out just before that.

90 Q. I am talking about from the time you went on that bridge to work up to the time when Tom Holbrook was killed; any time that you were taking out bolts from that bridge, robbing the bridge. Is that the way you did it, the way you have just explained?

A. (A pause without response.)

By the COURT: The way that you did it that day, is the way you explained to Mr. Werth, to lie down on the ends of the ties?

WITNESS: Yes, sir.

Q. Which passed over that bridge first that day, the coal train you have spoken of that like to caught you all, or first No. 15?

Defendant's Objection.—Counsel for defendant object to the question, because the witness has already said he did not know, but that he thought first No. 15 passed first.

The COURT: I think the witness may answer.

Defendant excepts.

A. I think the passenger train passed first.

Q. After that coal train passed over that bridge, did you bring any of those framing blocks that you have spoken of and put them on the west bound track and go to framing guard rails?

A. Well, some of them went to framing guard rails just after that.

Q. Then I understand you to say that after the coal train passed by you brought in framing blocks off from the ground, or wherever they were put at, and put them down on the west bound track and went to framing guard rails, or that some one of the crew did?

A. Some one of them, yes, sir.

Q. How many guard rails did you frame there that day?

A. I don't remember.

Q. Well, about how many?

A. May be four.

Q. How far apart are those guard rails in that track. I mean, how far are they spaced apart?

A. They are spaced, I guess, or some of them, may be six inches.

Q. And you cut or mortise a dap in the guard rail for every cross-tie?

A. Yes, sir.

Q. How deep do you mortise that dap? How much clear guard rail do you leave above the mortise after it is bolted down?

A. Well, I guess there are six inches.

91 Q. How many men would work on framing the guard rail after it was marked and put on the framing blocks between the rails?

A. Well, I have worked on them with three saws running.

Q. How many men worked on those guard rails there that day in sawing out and then adzing out the daps?

A. Well, I don't know.

Q. Well, about how many?

A. Well, I guess three or four.

Q. Four to each guard rail?

A. Four to each one?

Q. I will ask the stenographer to read the question. (Which is done.)

A. No, sir.

Q. Well, that is what I am asking you to tell the jury, how many men were at work to a guard rail when they were framing it?

A. I thought you asked me how many were working there on that one.

Q. That is what I did ask you, was how many men that day on that bridge would work on the new guard rail when they were framing it to put it down?

A. Well, there would be, may be, two saws running, or an adz or two.

Q. Why were there a less number of men working on a guard rail that day than usual? A while ago you said you had seen three saws and as high as four?

A. Well, I have, but I didn't see it there that day.

Q. Well, why didn't you see it there then? Why didn't they have the usual number of men working there that day?

A. Well, the gang wasn't there, all of it.

Q. You didn't have enough men in that gang, do you mean?

A. They had sent six or seven men to do another job that day.

Q. So then, on that occasion you only had two men at work on the guard rail framing it; is that correct?

A. There were more men up there then than that.

Q. I am not asking you how many men were up there doing something else, but how many men would be working on the guard rail when they were framing it on that occasion?

A. Oh, I guess there were about three of them working on it anyway.

Q. Just now you said two; which do you mean?

A. About two sawing and one adzing, I guess. I wasn't up there.

Mr. McCORMICK: You say you were not up there; where were you?

WITNESS: I was down under the bridge.

92 Mr. McCORMICK: You were down under the bridge and not in sight of them?

WITNESS: No, sir, I was under the bridge.

Counsel for plaintiff objects to this interruption, and states that it would be more proper on cross-examination.

By the COURT: I think so.

Q. If you were not in sight of them and did not know anything about it, why did you tell me that there were either two or three there?

A. Oh, I could see them there where they were at work, but I wasn't by them.

Q. If you could see them, then it did not make any difference whether you were under the bridge or somewhere else?

A. I was going ahead with my work.

Q. Which did you see? You have said there were two men sawing and one adzing, or mortising those daps out on the bridge. Is that correct, or incorrect?

Defendant's Objection.—Counsel for defendant object to the question and say that witness has not made the statement reputed to him. He has not said that there were any definite number, but that he thought there was such and such a number, and counsel for plaintiff ought not to state that he has said such a thing when he has not, in fact, said it.

Counsel for plaintiff says that witness may correct him if he is wrong, but he thinks he is right.

Q. What is your answer to that question? If I assume that you have said anything that you have not, in fact, said you have a right to correct me. A lawyer has not the right to put anything into the mouth of a witness that he has not said.

A. (A pause without response.)

The Court: Mr. Hinkle, tell now what is your recollection of the number of men working on the guard rail and notching it?

A. Well, my recollection of the number of men working there was three men on the guard rail.

Q. I am not sure, but I think you have stated that those guard rails were about twenty feet long; is that right?

A. Yes, sir, as near as I know.

93 Q. How many cross ties did that guard rail extend across after it was put down, about?

A. About fourteen or fifteen, may be.

Q. Then there would be fourteen or fifteen daps that would have to be mortised to the guard rail?

A. Yes, sir.

Q. How deep would those daps be?

A. An inch, some of them, I guess.

Defendant's Objection.—Counsel for defendant object to this line of examination as wholly immaterial and irrelevant, and say that this is merely encumbering the record with matter wholly immaterial.

Objection overruled.

Defendant excepts.

Q. How long would it take a man to saw out and then adz out daps in a guard rail, in one whole guard rail?

A. Ten or fifteen minutes.

Q. They could put in fourteen or fifteen daps in fifteen minutes; is that what you mean to tell the jury?

A. I said fifteen or twenty minutes.

Q. What did you say?

A. Fifteen or twenty minutes.

Q. Do you mean to say that you could make a dap in a space of a minute or a minute and a quarter, one dap for every minute or a minute and a quarter; is that right?

A. No, sir, I don't say they can be done that way.

Q. I am asking for your best information as to how long it would take them to fix that guard rail and bolt it down. Do you still think they could make ten or fifteen daps in that guard rail in that length of time?

A. They ought to make it and put it down in twenty-five minutes.

— How many bolts would they put through, once every tie, or once every now and then?

A. Every third tie, I believe.

Q. There would be five bolts put in then for a guard rail about twenty feet long, is that right?

A. Yes, sir.

Q. How would they get those bolts through the guard rail?

A. How would they?

Q. Yes?

A. They would bore a hole through the timber.

Q. What would they bore that hole with?

A. An augur.

Q. An ordinary augur that a man holds in his hands and bores with?

A. No, sir, a great long augur that you use both hands with.

Q. Well, I mean that he turns it with his hands?

A. Yes, sir.

94 Q. It is not turned by any other power than a man's hands?

A. Just with his hands.

Q. Then he bores holes through the guard rails and the ties to put the bolts in; is that right?

A. Yes, sir.

By the COURT: The hole is already in the tie, isn't it?

WITNESS: No, sir.

By the COURT: The bolt hole is already in the tie, or especially when they use the old tie, isn't it?

WITNESS: Some of them are, yes, sir.

Mr. WERTH: They do not necessarily put them back in the same holes, as I understand.

WITNESS: When we put in a new tie, we put in a new hole.

Q. If I understand you correctly, you tell the jury that they can saw and then adz them out, or mortise out, fourteen to fifteen daps and bore five holes and put in five bolts and tighten up the bolts under the bottom with a nut in twenty-five minutes, do you?

A. I don't say that three men could.

Q. How many men would it take to do that in twenty-five minutes?

A. It would take about six or seven.

Q. You did not have six or seven there that day, did you?

A. No, sir.

Q. I have been examining you all day about this case on that



bridge on that day. I haven't asked you about any other time or place. I have understood you to respond to my questions with reference to this time and place——

Defendant's Objection.—Counsel for defendant objects to the question, because not fair to the witness. Counsel for plaintiff has propounded to the witness a great many questions that were general in their terms, and which have been responded to in the light in which they were propounded. It is now improper for plaintiff to state that he at all times referred to the place in question at or just shortly before the time of the accident, and at this late date attempt to have all of the answers responsive to questions not thus propounded at the time, but now being made to refer to that time.

By the COURT: I think counsel has a right now to call  
95 the witness' attention to what he has intended and what he now propounds to the witness.

Defendant excepts.

Q. When you replied that it would take twenty-five minutes, you had in mind that six or seven men would be working on it?

A. Yes, sir.

Q. How long do you think it would take if only three men were working on it, as was the case on this occasion?

A. Well, I expect it would take three men an hour.

Q. To frame one guard rail and put it down?

A. Yes, sir.

Q. Now, Mr. Hinkle, with the passage of this coal train, and when it ran on to the bridge and struck this guard rail, I understood you that you brought in your framing blocks and put them across the track and went to framing guard rails. How many guard rails did you frame between that time and the time No. 92 came out of the tunnel on the east bound track?

A. Do you mean after the freight train pulled through the tunnel?

Q. I will ask the stenographer to read the question. (Which was done.)

A. After train 92 came through the tunnel? I can not understand that.

Q. In between the time when the coal train passed by and the time when No. 92 came out of the tunnel?

A. (A pause without response.)

By the COURT: Mr. Werth, you have forgotten that these men went to dinner in that interval.

Q. You went to dinner there in that interval, did you not?

A. (A pause without response.)

By the COURT: May be the witness does not understand the word "interval."

Q. From the time when you went to work after dinner to the time when No. 92 came out of the tunnel, how many guard rails did you frame?

A. I have no idea.

Q. When you stopped to go to dinner, were you framing guard rails? I mean, were any of the men on the bridge framing guard rails at that time?

A. I don't know whether they were, or not.

96 Q. When you stopped to go to your dinner—when you left the bridge to go to your camp car, I mean?

A. I understand. I was trying to state what they were doing, but I can not think right now.

Q. You didn't go on the bridge to do anything else but to put down guard rails that day, did you?

A. No, sir.

Q. That was the only work you were going to do on that bridge that day, was it not?

A. Yes, sir, I think so.

Q. Now, when you stopped to go to dinner, what were the men doing on the bridge with reference to framing guard rails. Is that what they were doing, or not?

A. Yes, sir, I believe they were.

Q. Well, now, they stopped to go to dinner, and when they did that, did they leave those framing blocks on the west bound track and leave any of the guard rails on any of the framing blocks, or not?

A. No, sir.

Q. What did they do with them? You had them there at that time across the tracks, and I want to know what became of them?

A. We generally always picked them up and carried them out.

Q. What did they do that for? What did they take them off when they went to dinner for? Why didn't they leave them there?

A. Clearing up the track.

Q. What were they clearing up the track for, in order to go to dinner, when they would be back in a minute, or two?

Defendant's Objection.—Counsel for defendant object to the question, because it is entirely improper for counsel for plaintiff to state that the men would be back in a minute, or two, because he must know that they could not possibly eat their dinner in a minute, or two.

Q. What were you clearing the track for?

A. For the trains to go over.

Q. Were those obstructions that you speak of, the two framing blocks across the track, and the guard rail on top of them, or one framing block, for that matter, would that be an obstruction for trains?

A. Did you say if laying across the track?

Q. Yes, sir; just as you have testified that they would be laying across the track?

A. Yes, sir, they certainly ought to be cleared.

Q. It would be an obstruction, would it not?

A. Yes, sir, and you ought to clear it up.

97 Q. When they went to dinner they cleared it up. When they got back there after dinner they went to work at the same work again, as I understand?

A. Yes, sir.

Q. At the time 92 came out of the tunnel, who was framing the guard rail on that west bound track?

A. Tom Holbrook and Pierce Walters and John Hinkle and Bud Harrison, as well as I remember. They was up there.

Q. Who was sawing and who was adzing out the daps?

A. I don't remember who was sawing or who was adzing.

Q. And they had two framing blocks across the west bound track, and the guard rail put on them, just as you have described?

A. Yes, sir.

Q. That now, was when 92 came out of the tunnel; when 92 came out of the tunnel, what occurred, if anything?

A. What occurred?

Q. Yes, what occurred, if anything?

A. Well, she pulled smoke out on the bridge.

Q. Well, did anything else occur? Foreman Carbaugh, where was he at the time?

A. He was there.

Q. Whereabouts on the bridge?

A. (A pause without response.)

Mr. WERTH: I ask the gentlemen on the other side to give me the photograph showing the bridge extended all the way across to the tunnel.

Mr. SMITH: All right, here it is.

Q. Where was Mr. Carbaugh?

A. I can't see it that way.

Q. Then, I will turn it around. This is the tunnel, and this is the east end.

Mr. SMITH: And this is the west bound track, and that is the east bound track.

Q. Where was Carbaugh at the time freight train No. 92 came out of the tunnel, as near as you can tell. Of course you can't put the exact spot down there on that photograph.

A. Well, he was somewhere right along here, as far as I remember.

Q. Nearer to the east end of the bridge than to the middle of the bridge, as you now indicate on that photograph?

A. Yes, sir.

Q. Well, now, you say No. 92 pulled smoke out on the bridge?

A. Yes, sir.

Q. Did you see or hear Foreman Carbaugh do or say anything about that time?

A. I heard him say "No. 92 is going through the tunnel, boys"

Q. He was talking to the men, was he not?

A. Yes, sir.

Q. Well, did you see or hear him do or say anything after that and before second No. 15 came?

A. Yes, sir, I heard him holler "Clear up."

Q. That was after he said he saw No. 92 coming through the tunnel?

A. Yes, sir.

Q. And after that he said "Clear up?"

A. Yes, sir.

Q. Where was No. 92 when he said that; had it gotten on the bridge?

A. No, sir.

Q. He said "Clear up," before No. 92 got on the bridge?

A. Yes, sir.

Q. What was he clearing up for at that time? No. 92 was on the east bound track going east, I believe; is that right?

A. I suppose he knew that there was another train coming.

Q. You are guessing at that now. You didn't hear him say it, did you?

A. I heard him say that day that there would be another 15.

Mr. McCORMICK: What did you hear him say.

WITNESS: Some time that morning I heard him say that there would be another fifteen.

Q. When No. 92 pulled out of that tunnel and smoke settled over that bridge, was it usual to clear up for 92 when the men were working on the west bound track?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. When Carbaugh said "Clear up," it was after 92 had approached the bridge and smoke had been pulled out on the bridge, or was expected to be pulled out on the bridge, was it?

A. As well as I recollect, the freight train was in the tunnel when he hollered that 92 was in the tunnel.

Q. When he hollered what?

A. (A pause without response.)

Q. Did he say "Clear up" immediately after saying, "I see No. 92 coming, boys?" Did he follow that up immediately by saying "Clear up?"

A. Yes, sir. He followed that immediately by saying "Clear up."

Q. Did he tell them to clear up because he saw Ninety-two coming through the tunnel?

A. Yes, sir.

Q. At that time second No. 15 had neither been seen nor heard?

A. No, sir.

99 Q. Tell the jury how long that smoke made by No. 92 was on the bridge?

A. How was that?

Q. I mean, tell the jury how thick that smoke that was made by No. 92 was on the bridge?

A. Well, it was pretty foggy.

Q. Was it damp, heavy weather.

A. Yes, sir.

Q. Will you tell the jury how that smoke settled over the bridge,

to what extent did it hide and obscure the bridge and hide the men on the bridge?

A. As it pulled through the tunnel, it pulled the smoke right out on the bridge.

Q. Mr. Hinkle, I am trying to ask you to tell the jury if the smoke was so thick on the bridge that the men on the bridge could not see on account of the smoke?

A. Yes, sir, it was a pretty heavy fog.

Q. Could a man in the middle of that bridge see anything east of him in that smoke?

A. Yes, sir.

Q. What could he see?

A. He could—

Q. (Interrupting.) I thought you said just now the smoke was so thick that—

Defendant's Objection.—Counsel for defendant object to counsel for plaintiff interrupting the witness and not permitting him to finish his answer.

The COURT: Go ahead and finish your answer.

A. When you kind of stooped down you could see kind of under the fog. It hadn't settled down on the bridge yet. It was—

Q. (Interposing.) How far from the cross-ties was it before you would strike smoke?

A. Oh, I guess it was—(witness pauses).

Q. How many inches?

A. Two or three feet.

Mr. McCORMICK: How much did you say?

WITNESS: Two or three feet, I would guess.

Q. If a man were standing in the middle of that bridge and wanted to see east of him, he would have to stoop down so that his head would be within two or three feet of the cross ties and look under the smoke; is that what I understand you to say?

A. Yes, sir.

Q. Now suppose a man was standing up in the middle of that bridge, or about the middle of the bridge, looking east,  
100 would he be able to see anything through that smoke?

A. No, sir, I don't suppose he would.

Q. At the time that Mr. Carbaugh said "I see No. 92 in the tunnel, boys; clear up." there were two framing blocks and one guard rail on top of them across the west bound track, if I understand you correctly?

A. Yes, sir.

Q. What occurred after Mr. Carbaugh said that?

A. How was that question?

Q. What occurred after Mr. Carbaugh said, "Clear up?"

A. Well, the freight train pulled smoke out on the bridge. I think that is what occurred after he said "Clear up."

Q. So that everything that occurred, and the only thing that did occur after he said "Clear up," and, I mean, with reference to the men who were framing the guard rail in the middle of the west bound track, was what you have said, or what did occur?

A. They taken the framing all off the track.

Q. How do you know that?

A. Well, I went to get down in the bridge, and looked up the railroad, and I looked right back up the road and seen where there was nothing on the track, no blocks or anything.

Q. You had not been one of the framing men, had you?

A. No, sir, not that day.

Q. You had not taken any part in that framing, had you? You were doing other kinds of work?

A. Well, I help carry in one piece or two.

Mr. McCORMICK: You help carry in one piece, or two you say?

WITNESS: Yes, sir, sometime that day. I wasn't working at the guard rail at that time, but I had helped to carry in some guard rails during that day.

Q. At the time the foreman said "Clear up," the men framing the guard rails were the men you mentioned a short time ago, Tom Holbrook, Pierce Walters, John Hinkle, and Bud Harrison?

A. Yes, sir.

Q. When the foreman said "Clear up," it was the business of those four men to clear that track where they were framing those three pieces of timbers, I believe; is that right?

A. Yes, sir, they were supposed to clear it up.

Q. It was none of your business, was it?

A. No, sir.

Q. And you were not there, were you?

A. Not where they were.

Q. There was no reason in the world for your undertaking to look under that smoke to see whether they had attended  
101 to their business, or not, was there?

A. Not without stooping down.

Q. I ask, there was no reason for your doing that; it was none of your business to do that?

A. None of my business, no, but——

Q. (Interposing.) But you did it?

A. Yes, sir, I did it.

Q. I ask you to tell the jury if that east framing block had been cleared up at the time you looked to see those men? You swear that to the jury?

A. I don't understand the question.

Q. I will ask the stenographer to read it to you. (Which is done.) I mean by "East framing block," the framing block that was across the rails at the east end of the guard rail that they were framing. Do you swear that that block had been cleared?

A. I did not see it on the track.

Q. Between you and where that framing had been going on, was there, or not, a large amount of smoke?

A. Yes, sir, up in the bridge over——

Q. (Interposing.) Do you know whether that piece of timber had been cleared off that bridge, or not?

A. It wasn't on the track when I looked up that way.

Q. You mean to say that it wasn't on the track or do you mean simply to say that you did not see it? Now, which do you mean?

A. I simply say I did not see it.

Q. Well, I will ask you if John Hinkle moved that piece of timber, so far as you know?

A. No, sir, not that I know of.

Q. I will ask you if Pierce Walters moved that piece of timber, so far as you know?

A. No, sir, I do not.

Q. I will ask you if Bud Harrison moved that piece of timber, as far as you know?

A. I don't know.

Q. If it was moved by any other man than one of these men, it must have been moved by Tom Holbrook, is that right?

A. I didn't see anybody move it.

Q. You didn't see anybody move it?

A. No, sir, it was in the clear. It was off the track.

Q. When did you see it in the clear, after the passenger train passed?

A. No, sir.

Q. You did not see it in the clear before the passenger train passed, did you?

A. Yes, sir.

Q. How long before?

A. Oh, something about five minutes, I guess.

Q. How did you happen to see it?

A. I was getting down in the bridge and turned my head around and looked up under the smoke.

102 Q. Well, that was the same occasion I asked you to tell the jury about a little while ago, and I afterwards asked you if you meant by that to say that it was not there, or if you meant simply to say that you did not see it, and you answered that you meant to say simply that you did not see it. How do you explain that?

A. Well, I said I didn't see the blocks on the track.

Q. Do you mean to tell the jury now that when you ducked your head under that smoke and looked in that direction that you saw that particular block cleared?

A. I didn't see no block.

Q. Mr. Hinkle, you say now I believe that you saw one of those framing blocks in the clear when you looked under the smoke?

Defendant's Objection.—Counsel for defendant object to the question, because not properly quoting the witness. Counsel for defendant say that the witness has said all of the blocks were in the clear. Did you not, Mr. Hinkle?

WITNESS: I saw nothing on the track when I looked under the smoke.

Q. Is that what you say, that you saw nothing on the track?

A. I seen a man or two, feet.

Q. Still on the track?



A. Yes, sir.

Q. Do you know who those men were?

A. No, sir, I never noticed who they were.

Q. How do you know that the framing timber that you say you saw in the clear when you ducked your head and looked under the smoke was the one at the east end of the new guard rail rather than the one at the west end of the new guard rail?

Defendant's Objection.—Counsel for defendant object to the question, because the witness has said that all of the timber was removed from the track.

The COURT: Let the witness say.

A. I said I saw nothing across the track.

Q. Now, I want to know if I am to understand you by that answer to say, that that is the only reason you have for now saying the track was clear, because you saw nothing on the track when you looked through the smoke? Is that the only reason you have for saying the track was clear?

A. Yes, sir, when I looked under the smoke.

103 Q. Do you mean to say, and to swear to this jury, that that track was clear, or simply that you saw nothing on the track? Which did you say now?

Defendant's Objection.—Counsel for defendant object to the question, because a repetition upon repetition of a question which has been asked and answered.

Objection overruled.

Defendant excepts.

A. I say that I saw nothing on the track, except that I seen some men, that I saw some men on the bridge.

Q. Who were the two men that you saw on the track?

A. I don't know.

Q. Why don't you know?

A. I never looked enough to know.

Q. Well, can you explain to me why you can not tell the names of the two men you saw on the track, and yet can tell the jury that you saw nothing in the way of timbers on the track?

A. Well, I never saw anything but their feet.

Q. Why couldn't you see anything but their feet?

A. I was looking under the smoke.

Q. That smoke was rolling, moving, I suppose, all the time that you were looking under there; is that right?

A. Yes, sir, I think it was.

Q. You don't know whether Tom Holbrook was one of the two men you saw, or not?

A. No, sir, I don't know.

Q. If I understand you correctly, the instant before you looked, one of those two men, whose feet you saw, may have cleared that framing block for all that you know?

A. It was not across the track.

Q. And you don't know the name of any of the men who cleared up there, unless it was Tom Holbrook?

Defendant's Objection.—Counsel for defendant object to the question, because leading and otherwise improper.

Counsel for plaintiff replies that the witness has already answered the question, and that he is clearing it up.

Counsel for defendant say that if he has already answered the question it is unnecessary to go into it again, but that he is sure no such question has been propounded to the witness.

104 Q. I asked you a little while ago if Pierce Walters was the man who removed that timber, so far as you knew, and you answered me. Now, what was your answer?

A. I said I didn't know.

Q. I asked you if John Hinkle, your son, was the man who moved that piece of timber, so far as you knew, and you answered me. What was your answer?

A. No, sir.

Q. You said you did not know?

MR. SMITH: He said "no, sir."

MR. WERTH: I know that he has just now said "no, sir," but when he answered me before he said he did not know.

Q. As to Bud Harrison, did he move that piece of timber, so far as you know?

A. I said I didn't know who moved the timber.

Q. How long was that before you think second section of fifteen came around the curve?

A. I expect it was something, may be, like five minutes.

Q. Something like five minutes?

A. Yes, sir.

Q. When fifteen came around the curve, was that smoke still on the bridge?

A. Yes, sir.

Q. It had not cleared up?

A. No, sir.

Q. When Foreman Carbaugh said to the boys, "There comes 92 out of the tunnel, clear up," what was the duty of those men on that bridge, in his crew of men?

Defendant's Objection.—Counsel for the defendant object to the question as improper.

Counsel for plaintiff says he will change the form of the question.

Q. Were you one of the men?

A. Yes, sir.

Q. What did you understand that order to you to mean for to do?

A. For me to clear up, which I done.

Q. Did you understand that it was your business to obey orders of the foreman when he gave them to you?

A. Yes, sir.

Q. It was the business of yourself, W. M. Hinkle, John Hinkle, A. L. Harrison, Pierce Walters, and W. T. Holbrook, all and each of them who heard that order, to clear up that bridge, is that right?

A. Yes, sir, when he hollered "clear up."

105 Q. When that smoke was on the bridge, could any man have done any work?

A. The smoke hadn't reached the bridge when he said "Clear up."

Q. I understand that. But during the time when you looked under that smoke, and looked and saw the feet of these men, was the smoke over the bridge thick at that time?

A. Yes, sir.

Q. Could a man have worked in it?

A. Yes, I guess he could have worked in it.

Q. What sort of work could be have done in it?

A. He could have worked by picking up almost any tool.

Q. Could he have done anything but clear the track?

A. Yes, sir.

Q. What else could he have done?

A. Well, I don't know whether he could have done anything, or not.

Q. I am asking if he could have done anything else but clear the track and obey the orders of Foreman Carbaugh when he said "Clear the track?"

A. No, sir, I don't expect he could.

Q. Do you know of anything that those two men whose feet you saw could have done, or could have been doing on the bridge at that time, but clearing up the track?

A. They were still.

Q. They were still?

A. Yes, sir.

Q. Do you mean at the instant when you saw them?

A. Yes, sir.

Q. How long did you lean over under the smoke and look and watch them?

A. (A pause without response.)

Q. You say they were still. I want to know how long you watched them in order to enable you to see that they were still?

A. I couldn't tell you. I just turned my head on them and seen that they were still.

Q. How long did you look at them? Did you merely glance one instant at them, or did you stand under there and look at them?

A. I looked up that way two or three times.

Q. Why did you look up that way through that smoke when you had not been one of the men to clear the track of obstructions?

A. We were looking for another train.

Q. You were in the clear, were you not?

A. I got in the clear.

Q. You were at that time in the clear when you looked up under there?

A. No, sir.

Q. Were you on the track?

A. Yes, sir.

Q. On the west bound track?

A. Yes, sir.

Q. Between the rails?

A. Between the rails.

106 Q. Then you stooped down very low when you looked under the smoke to see those men?

A. I didn't have to stoop down very low.

Q. You got down under the smoke?

A. Yes, sir.

Q. Were you standing still, or walking?

A. I was standing.

Q. Standing still?

A. Yes, sir.

Q. What were you standing still for after the foreman had told you to clear up, when you say it was your business to obey the foreman? What was your object in standing there still?

A. Well, I don't know.

Q. Can you give me any reason why you were standing still there, other than to watch those two men?

A. I don't know. I thought may be that I would see them get in the clear, or something like that.

Q. Were you the foreman?

A. No, sir.

Q. Was it any of your business to see that they got in the clear?

A. No sir.

Q. It was none of your business either to remove those obstructions or to see that they got in the clear, but it was your business to get in the clear yourself after the foreman told you?

A. Yes, sir.

Q. Why didn't you do your duty and obey the foreman's orders?

Defendant's Objection.—Counsel for defendant object to the question, because it is improper, and because counsel is leading his own witness.

The COURT: I think he may do that.

Defendant excepts.

Q. Well, you understand that question; now, go ahead.

A. (A pause without response.)

Q. You were disobeying the orders of the foreman and standing stock still in the track?

A. I disobeyed the orders of the foreman.

Q. Why did you do it when you knew second section of No. 15 was due in a minute, and that the smoke was between you and that you could not see it?

A. Well, I could have got in the clear, I think, even if I had saw it.

Q. What is that?

A. Even if I had seen it coming, I could have gotten in the clear, I think.

Q. Why were you standing in there watching the feet of those men?

A. I never watched them, but just throwed my eyes around and seen them.

107 Q. Did you hear anybody holler "Railroad"?

A. Yes, sir.

Q. Do you know who it was?

A. It sounded like the foreman.

Mr. McCORMICK: Who was the foreman?

Mr. WERTH: We are all agreed that it was Mr. Carbaugh. There is no dispute about that.

Q. At the time you heard the warning, "Railroad," where was the freight train No. 92; still on the east bound track?

A. Yes, sir.

Q. What is the grade there on the east bound track?

A. Sir?

Q. Was that freight train going up grade?

A. Yes, sir, it was going up grade, I guess.

Q. And second section of No. 15 was going down grade?

A. Yes, sir. Let's see, I didn't understand you about No. 15.

Q. Well, if the freight train was going up grade, No. 15 was necessarily going down grade, because they were going in opposite directions?

A. Yes, sir, it was coming down, but I hadn't saw it.

Q. I know that you had not seen it, but I was asking you about the grade of the track.

A. Yes, sir.

Q. Did No. 92 have one or two engines to it?

A. Two, as well as I remember.

Q. Was it a short or a long train of cars?

A. It was a pretty long train.

Q. Where were you standing at the time you heard the cry "Railroad," with reference to the center of the bridge?

A. Right about the center, I reckon.

Q. At that time were you looking at the man whose feet you saw under the smoke?

A. At the time he hollered "Railroad"?

Q. Yes.

A. No, sir, I wasn't looking at them at that time.

Q. How long had it been since you had been looking under the smoke and seen their feet?

A. Well, two or three minutes, I reckon.

Q. Then you had been standing stock still in the middle of the west bound track for several minutes when you heard the man holler "Railroad;" is that right?

A. Yes, sir.

Q. I think you may take the witness.

108 Cross-examination.

By Mr. McCORMICK:

Q. Mr. Hinkle, I understood you to say that you have been in the service of the railway company only since last August?

A. Yes, sir.

Q. And that to the time of the accident, you had only been in its service some four or five months?

A. Yes, sir.

Q. You were not an experienced railroad man?

A. No, sir.

Q. Well, now, at what time did you go to work that morning?

A. At seven o'clock, I think.

Q. What directions, if any, did Foreman Carbaugh, the man who was in charge of the crew or gang, give you that morning?

A. To load ties.

Q. You loaded ties until eleven o'clock, did you? Where did you load ties?

A. Right there at Pando.

Q. Was that on the bridge or away from the bridge?

A. Away from the bridge.

Q. Now, when you went to work on the bridge, what notice or warning, if any, did Foreman Carbaugh give you with respect to danger of working on the bridge?

A. He said, "Boys, look out, here is a close place."

Q. What else did he say?

A. As well as I remember he said, "There is a short curve and a tunnel."

Q. Did he in that conversation there, that talk with you all, warn you to look for approaching trains?

A. Yes, sir, that is my way of understanding it.

Q. Well, now, did he say anything to you about clearing both tracks at the time of the approach of trains, and, if so, what did he say?

A. He said, "Boys, you must clear both tracks." I think that is the way he said it.

Mr. WERTH: I want you to fix the time when that occurred.

Mr. McCORMICK: Eleven o'clock in the morning when they went on the bridge to do the work.

Mr. WERTH: And before they went to work on the bridge?

Mr. McCORMICK: Yes, not after they had gone on to the bridge.

109 Q. Mr. Hinkle, if I understood you correctly, that warning was given you on the bridge, or am I right about it? You may state when it occurred?

A. I didn't understand you.

Q. Well, when did he give you the warning to clear both tracks?

A. That was when we went to work at the bridge.

Q. Was that on the bridge that he gave you that warning or before you got on the bridge?

A. Before we got on the bridge.

Q. He told you, then, before you got on the bridge that it was a close place and that you would have to clear both tracks?

A. Yes, sir.

Q. Well, now, taking up for a moment the forenoon: You all were engaged there, if I understand it, in framing guard timber, or guard rails; is that right, or not?

A. All except two of us, I think.

Q. What were you doing?

A. I was down on the bridge robbing guard rails, taking bolts out of the pieces of guard rail.

— When you say "robbing," what do you mean by that?

A. I mean taking a piece of timber loose off of the bridge.

Q. You were not stealing anything from anybody, but you were robbing the old rail to put back the new one?

A. Yes, sir.

Q. When that freight train came along that morning, I understand that you were engaged with some three other men in helping frame, or to carry on the bridge a part of the framing timber?

A. Yes, sir.

Q. Where did you put that?

A. We put it out on the ties.

Q. You put it out on the ties?

A. Yes, sir.

Q. Well, you have two pieces of timber upon which you laid it, if I understand you correctly; is that right?

A. Yes, sir, but I don't think we had brought them out.

Q. You had not brought those out at all?

A. No, sir.

Q. When the train approached, did Carbaugh give notice of the train, that it was coming?

A. The east bound train?

Q. Yes, sir.

A. Yes, sir.

Q. What warning did he give you?

Mr. WERTH: That was the west bound train in the morning, if that is what you are talking about.

Mr. McCORMICK: All right.

110 Q. I am now talking about the west bound train in the morning, the one that you heard blow. Did Mr. Carbaugh give you any warning as to that?

A. Yes, sir.

Plaintiff's Objection.—Counsel for plaintiff objects to this mode of questioning the witness, and says that the same law that permitted him to lead this witness in chief forbids counsel for defendant doing it on cross-examination. Counsel suggests that counsel for defendant go ahead with the examination, but he wishes at this time to call attention to that fact.

Q. Now, nobody was hurt by that train, was there?

A. No, sir.

Q. When you put that lumber down, who was with you?

A. My son.

Q. You and your son were at one end of it, were you?

A. Yes, sir.

Q. Who was at the other end?

A. Tom Holbrook and Pierce Walters.

Q. Did they get their end down and clear the track?

A. Yes, sir.

Q. Did you get yours down and clear the track?



A. Not exactly.

Q. I mean and clear the rail?

A. No, sir, not exactly, I don't think.

Q. That timber was struck by that passing train, if I understand you correctly?

A. Yes, sir.

Q. But nobody was hurt by that?

A. No, sir.

Q. You got it down clear of the railroad steel rail, but not clear of the guard rail, if I understand you correctly?

A. That is right.

Q. That is right, is it?

A. That is right.

Q. And the train, as it came along, struck that piece of timber, but it hurt nobody?

A. No, sir.

Q. Did everybody clear; I mean, did everybody get out of the way of the train?

A. Yes, sir.

Q. And nobody was hurt by it?

A. No, sir.

Q. You continued at that work there from eleven o'clock until what time, and then went to dinner?

A. We went to dinner at twelve o'clock.

Q. How far is your place of getting dinner from where you were working?

A. Well, it is right there close.

Q. Who went to dinner with you?

A. Well, Mr. Holbrook, Pierce Walters—

Q. (Interposing.) Well, just say if all of the gang went.

A. Yes, all that was there.

111 Q. Was Mr. Holbrook in the crowd?

A. Yes, sir.

Q. Was he at the dinner table?

A. Yes, sir.

Q. Did any conversation occur at the dinner table between him and you?

A. Yes, sir.

Q. What was it?

A. He told me that I was too slow about clearing up, and that a train would come along and kill me some of these days.

Q. You had been there long enough to know that when a warning was given you of the approach of a train, you should get in the clear?

A. Yes, sir.

Q. And get out of danger?

A. Yes, sir, certainly.

Q. You had known that?

A. Yes, sir.

Q. Now, Mr. Hinkle, trains were run that day just as they had been run every day before since you had been there, were they not?

A. Yes, sir.

Q. Passenger trains often run in double sections, don't they?

A. Yes, sir, I noticed that.

Q. And freight trains when they come out of the tunnel carry with them smoke, which covers and settles over the bridge?

A. Yes, sir.

Q. But by looking under the smoke you could see what is going on on the bridge?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. And that day you did look under the bridge, and saw what was going on under it? I mean, under the smoke?

A. Yes, sir, under the smoke.

Q. Now, when First No. 15 came along it carried signals, which the men told you meant, you being inexperienced, that another section was to follow that section?

A. Yes, sir.

Q. And that that other section could be expected at any time at all, that is true, isn't it?

A. Yes, sir.

Q. You didn't know when it was coming, or how late it was?

A. No, sir, I did not.

Q. Did you know of any discussion between Mr. Carbaugh and Mr. Holbrook that morning as to whether that second section would be a freight or a passenger train, and, if so, state what it was?

A. Yes, sir, I believe I remember hearing them talking about it.

Q. What occurred?

A. I believe that Mr. Holbrook said that there would be another one, for the first one did not have any dining car.

Q. Another what?

A. Another train.

Q. To whom did he make that statement?

A. To Mr. Carbaugh.

112 Q. That there would be another one coming, because the first one had no dining car?

A. Yes, sir.

Q. Was there any discussion between them as to whether the second section would be a freight train, or whether it would be a passenger train, and, if so, did Holbrook in that connection say it was going to be a passenger train, because there was no dining car on the first section?

A. Yes, sir.

Q. Now, you went back in the afternoon, after you got through dinner. The first train that came through that tunnel was No. 92; a freight train, I mean?

A. That is the only one I remember.

Q. When that train was seen to be approaching, or was heard to be approaching, and while it was still in the tunnel, what did Mr. Carbaugh say or do?

A. He said 92 is going through the tunnel.

Q. Did he say anything about clearing up?

A. Yes, sir, he says, "Clear up!"

Q. What does that mean—"Clear up?"

A. That means to take your timbers, or whatever you have on the rails, off, and get out of the way of the track.

Q. That means to remove all obstructions on the track to the outside?

A. Yes, sir.

Q. And for the men themselves to get in the clear and out of danger of the passing train?

A. Yes, sir.

Q. Now, you understood that, did you?

A. Yes, sir.

Q. And everybody understood that that morning, did they not?

A. Yes, sir.

Q. And that was given in your distinct hearing?

A. Yes, sir.

Q. Now, when 92 passed, I understood you to say to the jury that the track was clear?

A. I saw nothing on the track.

Q. Well, now, if anything had been on the track, from the position that you were occupying, could you have seen any obstruction on it, such as timbers across the track?

A. Yes, sir.

Q. Was there any timbers on it, as a matter of fact?

A. I never saw any.

Q. You never saw any?

A. No, sir.

Q. My question is, if there had been any timbers on that track, or any obstruction on it, could you have seen it?

A. Yes, sir, I could have seen it.

Q. From your position, and the way you were looking?

A. Yes, sir.

Q. I understood you to say that you looked under the smoke?

A. Yes, sir.

113 Q. And that you could see under the smoke; am I right about that?

A. Yes, sir.

Q. And that you saw no obstruction on that track at all?

A. No, sir.

Q. Will you tell the jury whether or not, at that time the men cleared the track, when he gave that warning?

A. Yes, sir, when I went to clear up, I seen Mr. Holbrook—when I got down in the bridge he stooped down, put his hand on the bracket and looked like he stooped over and stepped over on the floor beam.

Q. Who was the first man you saw clear?

A. I disremember.

Q. But you did see Mr. Holbrook clear?

A. No, sir, I didn't see him exactly clear, but I saw him put his hand on the bracket, and step over like he was going to step down in.

Q. Where could he step to if it looked like he was going to step down to some place?

A. He could have stepped down on to the floor beam.

Q. That would be a place of safety, would it?

A. Yes, sir.

— I understand you to say then, that the track was clear of men, and clear of timber at the time No. 92 came along, so far as you could see?

A. So far as I could see.

Q. I understood you to say that it was about five minutes before No. 15 came along?

A. Yes, sir.

Q. Now, then, when No. 15 sounded its whistle, what if anything, did Carbaugh say?

A. He hollered "Railroad."

Q. What does "Railroad" mean?

A. That means get in the clear.

Q. Get in the clear?

A. Yes, sir, that is the way I have been learned.

Q. Now, at what point was Carbaugh standing at that time, with reference to where you were standing and where Holbrook was standing? Was Carbaugh between you two, or not?

A. No, sir, they were above me.

Q. What did you say?

A. They was above me, as well as I remember.

Q. How far above you? And do you mean east or west of you?

A. I mean east of me.

Q. How far east?

A. Well, it looked like it might have been twenty or thirty feet.

— Were you within hearing of Carbaugh when he gave that warning of "Railroad?" And you did hear it, did you?

A. When he hollered "Railroad," for No. 15?

Q. Yes, on the approach of the second section of No. 15?

A. I was down about the middle of the bridge.

114 Q. Did you hear it?

A. Yes, sir.

Q. Now, I want you to describe the point where you say you saw Holbrook catch hold of the bracket and start down to some point, but you didn't know where he was going. Was that between you and Carbaugh, or not?

A. Yes, sir.

Q. How far was he from Carbaugh at that time?

A. He must have been fifteen feet.

Q. Now, when he started to get down, No. 15 had not sounded its whistle, if I understand you correctly?

A. No, sir, I hadn't heard it.

Q. He got in the clear then, or had a chance to get in the clear?

A. Yes, sir.

Q. Now, the warning that was given by Carbaugh at the time of

the approach of 92 was in an abundance of time for everybody to have cleared that track and gotten the timber off of it, was it not?

A. I didn't understand the question.

Q. I say, after Carbaugh gave this warning "Clear up," when No. 92 was coming through the tunnel, that that was in plenty of time for everybody to clear the track and get off, and everybody did get off, didn't they?

A. Yes, sir.

Q. There was plenty of time for everybody to get off?

A. Yes, sir, plenty of time.

Q. And, as a matter of fact, everybody did get off; that is true, isn't it?

A. After I saw Mr. Holbrook look like he was going down in the clear, I never saw anybody else until I saw him again.

Q. You saw him going down in the clear, as you supposed?

A. Yes, sir.

Q. Now, when No. 15 came a warning was given again, "Railroad?"

A. Yes, sir.

Q. Which is, to clear the track?

A. Yes, sir.

Q. Now, was the track clear at that time?

A. I suppose it was already cleared by that time.

Q. It was clear when 92 came. All the timber had been taken from there, and the men had gotten off, and only a few minutes elapsed before the second section of No. 15 came, and it must have been clear, was it not?

Plaintiff's Objection.—Counsel for plaintiff objects to the question, because argumentative and leading.

Counsel for defendant state that this witness is not hostile to counsel for plaintiff, but simply ignorant; that therefore this is cross-examination.

115. By the Court: The Court, in the presence of counsel, and out of the hearing of the jury, stated as follows: This witness impresses me distinctly as being quite favorable to the defendant and hostile to the plaintiff. He is not altogether stupid. It required an immense number of questions for counsel for plaintiff to elicit anything from him, while on cross-examination his answers to questions propounded by counsel for defendant have come with the greatest readiness. I therefore rule that the defendant can not ask this witness leading questions.

Defendant excepts.

Q. Now, state to the jury just what condition the track was in when second No. 15 came along; was it clear of men and of timber?

A. Yes, sir, it was clear of men and of timber as far as I could see.

Q. You stated to the jury a little while ago that you saw Mr. Holbrook catch hold of a bracket and go in a certain direction,

and that you did not see him until some time later on. When was the next time that you saw him later?

A. He was coming down by me and another fellow, where we got down in the bridge.

Q. Who was the other fellow?

A. Mr. Porter.

Q. Where did you see Mr. Holbrook at that time?

A. He looks over at us standing in behind the bracket.

Q. Did what?

A. He came down to us and looked over where me and Porter was.

Q. In what direction was he going?

A. He was going west.

Q. Did Mr. Porter say anything to him, and if so, what?

A. He says, "Get off there, Tom; something will come along and swipe you off."

Q. He said for him to get off of there or something would come along and strike him off?

A. No, swipe him off, Porter said.

Q. Oh, swipe him off?

A. Yes, sir.

Q. What did he do or say when Porter said that to him?

A. He just turned around and walked off down the railroad.

Q. Was there any manifestation on his face, that is, did he smile or laugh, or do anything of that sort?

A. It looked to me like he laughed.

Q. Do you know at about what point on the bridge the work was being done in the framing of these guard rails; was it about midway of the bridge?

A. Yes, sir.

116 Q. Or was it a little east of midway?

A. Something like the middle of it?

A. Yes, sir.

Q. Do you know at what point from the point where the work was being done, and where the timbers were on the bridge, Holbrook was found after he was killed, how many feet from that point?

A. From the timber?

Q. Yes, sir. I want to know where from the timber you all were framing for the guard rails, how many feet he was found from that place?

A. May be thirty feet.

Q. Were not you west of the timber, yourself?

A. Yes, sir.

Q. Now, Holbrook was going in what direction?

A. He was going west.

Q. From the point where the timber was being framed to the point wher Holbrook was found after he was killed, what is the distance? Isn't it forty or forty-five feet?

A. From where the framing was?

Q. Yes, sir; from the place where the framing was. Isn't it close to one hundred feet, in fact?

The COURT: Mr. McCormick, you must not suggest the answer to the witness. I will instruct the witness not to answer that question.

Defendant excepts.

Q. How near to the west end of the bridge was he at the time he was killed?

A. I just don't know, I never paid any attention.

Q. Do you know how far it was from the point where this timber was being framed for the guard rails?

A. I guess it would be thirty or forty feet, as I said a little while ago, didn't I?

Q. Yes. But you didn't measure it?

A. No, sir.

Q. And that is a mere matter of speculation or guess work with you?

A. Yes, sir.

Q. You don't know how far it was?

A. No, sir.

Q. Did you help to take Mr. Holbrook up after he was killed?

A. Yes, sir. I taken hold of him and helped raise him up, and then I let loose of him.

Q. Can't you give the jury some idea of the distance from that point to the place where the timbers were being prepared for the guard rails?

117 Plaintiff's Objection.—Counsel for plaintiff objects to the question, because the witness has already answered that it was thirty or forty feet.

Counsel for defendant reply that they want to know if the witness can not give some more accurate idea of it; but that they will be able to show it by other witnesses.

A. You mean from what?

Q. I mean from the point where this work was being done in the framing of the guard rails to the point where you helped pick Mr. Holbrook up. What was about the distance between those two points?

A. Oh, I guess it would be seventy-five or eighty feet.

Q. That is all.

Re-examination.

By Mr. WERTH:

Q. You first said it was forty or fifty feet, didn't you?

Mr. McCORMICK: He misunderstood me.

Mr. WERTH: I object to counsel interrupting the question and suggesting to the witness.

A. I didn't exactly understand the question.

Q. You understood it better after you heard Mr. McCormick change his question to one hundred feet didn't you?

A. I didn't understand that it was anything about the framing.

Q. Mr. McCormick asked you repeatedly, time and again, for the



distance from where they were doing this framing to the place where the body of Tom Holbrook was found. He first asked you if it was forty or fifty feet, and your first answer was that it was forty or fifty feet, in those identical words. He asked you that question and you gave him that answer, didn't you?

A. I didn't understand it that way.

Q. What is the difference between that question and the one he propounded to you last in which you put it at seventy-five or eighty feet, and you gave him that answer, didn't you?

A. (A pause without response.)

Q. All right, I will go ahead. Did you pick Mr. Holbrook up?

A. Yes, sir, I helped to pick him up.

Q. Do you know about where he was on that bridge?

A. He was near the east end of it.

118 Mr. SMITH: What did that question have reference to?

Mr. WERTH: Where he was picked up.

Q. Did I understand you to say that Mr. Holbrook's body was picked up near the east end of the bridge?

A. Yes, sir, near the end of it. I don't know just whether he was on the bridge here or there, or where he was on the bridge. I don't know just where.

Q. How close to the east end of the bridge was his body found?

A. (A pause without response.)

Q. It was a long ways from it, wasn't it?

A. Well, I couldn't tell. I guess it was, in my judgment, eighteen or twenty feet.

Q. His body was found eighteen or twenty feet from the east end of the bridge?

A. I never paid any attention.

Q. Let me ask you, are you sure of the approximate correctness of that answer, that his body was picked up within eighteen or twenty feet of the east end of the bridge? I mean by that, is that about right as to the distance?

A. I think so, in my judgment.

Q. In other words, you tell the jury that his body was found near the east end of the bridge?

A. Yes, sir, his body was found near the east end of the bridge.

Q. He was struck, in the language of Mr. McCormick on cross-examination, by a fast passenger train known as No. 15, was he not?

Mr. McCORMICK: I did not say a fast passenger train, or what. The record will not bear you out in that.

Mr. WERTH: Well, the witness may answer.

A. Yes, sir.

Q. You say that you have seen No. 15 go west every morning during the time that you worked there, from August until January. That is right, is it?

A. No, sir, I didn't say that I saw it every morning.

Q. I mean, of course, that you had seen it practically every morning, except Sundays.

A. Yes, sir, and sometimes in the week I didn't see it.

Q. No. 15 is the fast through passenger train, isn't it?

A. Yes, sir, they run pretty fast.

Q. About as fast as passenger trains run. About how fast was second 15 going that morning, the train that struck Holbrook, at the usual rate of speed?

A. Well, I don't know anything about the speed of trains. I heard some of them say there that it was going thirty-five to forty—or, I mean, thirty to thirty-five miles an hour.

Q. Thirty to forty-five miles an hour?

A. No, thirty or thirty-five miles an hour.

Q. You first said thirty-five to forty-five miles an hour, didn't you?

A. Well, I changed my mind.

Q. Well, suppose that train was the train that struck Tom Holbrook, how far east of the bridge would he have to have been in order for him to have been left within eighteen feet of the east end of the bridge?

A. Eighty or ninety feet, I reckon, in my judgment.

Q. Are you meaning by that to say, that in order for his body to have been left eighteen feet of the east end of the bridge, he would have to have been struck eighty or ninety feet east of the east end of the bridge? Is that what you are meaning to say?

A. I just don't know how far he was.

Q. How far do you think a train going from thirty-five to forty miles an hour, a passenger train, would knock a man when it hit him?

A. Oh, it would knock him a long ways.

Q. It would knock him a long ways, wouldn't it?

A. Yes, sir.

Q. I believe you stated in your examination in chief that they were working on those timbers about the middle of the bridge?

A. No, sir, I don't think I did. If I did, I misunderstood you.

Q. Where do you now say they were framing those timbers, if I misunderstood you?

A. (A pause without response.)

Q. With reference to the east and west ends of the bridge, I mean?

A. (A pause without response.)

The Court: Just answer the question.

A. Our framing was on the west end of the bridge.

Q. I don't know what you mean by that answer. I mean to ask you, where were the timbers across the track, and the guard rail on the timbers being at, with reference to being at or near, or east or west of, the middle of the bridge?

A. It was framed on the east end of the bridge.

Q. Do you mean to say that this framing of these timbers was done on the end of the bridge and not in the bridge; is that what you mean to say?

A. I mean to say that they put blocks across the track—

Q. (Interposing.) You don't seem to understand me, Mr. Hinkle. About how long is that Bridge, do you know?

120

A. No, sir, I don't.

Q. Well, now, where were those men doing the work of putting the daps in this guard rail; how far from the middle of the bridge were they doing that work? That is what I am trying to ask you.

A. After they got the guard rails framed?

Q. Where were they framing them at? Where did they have those pieces of timber, or blocks, across the rail at?

A. On the east end.

Q. Is that where you said they were in the beginning, in your examination in chief?

A. (A pause without response.)

Q. Didn't you say that when those men took in that guard rail that you helped to carry it in, when that coal train came along, that you took it in to about the middle of the bridge, and that Tom Holbrook laid down the end of it there, and that that is where you were framing it?

A. No, sir, we were not framing it there.

Mr. McCORMICK: You are talking about in the morning now.

Mr. WERTH: I am talking about the time of day when this work was being performed, whether it was in the morning or in the evening.

Q. When I was examining you about the incident that occurred in the forenoon, didn't you say that the four men took the guard rail and took it in on the bridge, and that when they got to the place where they wanted to frame it, that Tom Holbrook and the man with him laid their end down at the place where they wanted to frame it, and that that was about the middle of the bridge?

A. I think I said we took it in there to get our daps, to get ready for the framing.

Q. Do you mean to say now that after they went in there and got their daps, that they took the guard rail off the bridge to frame it?

A. Yes, sir.

Q. Took it off the bridge?

A. Took it back to the east end of the bridge.

Q. How far from the east end of the bridge?

A. I don't know.

Q. Was it on the bridge or off the bridge.

A. I wasn't at that framing when it was going on, and I don't know whether it was right plumb off the bridge, or not, or whether it was right on the bridge.

Q. Isn't this the first time that you have ever said in this case that they were framing that thing at the east end of the bridge, or near the east end of the bridge? Have you ever made that statement to this jury before?

A. When they were framing it that they were framing it on the east end?

Q. Yes.

A. I think I have.

Q. If Mr. Holbrook was helping to frame those timbers at the east end of the bridge, he would not have been in the smoke at all, would he, when No. 15 came along?

A. We were not framing it when No. 15 came along.

Q. Well, while they were framing it just before 15 came along?

A. Yes, sir.

Q. If Holbrook had been framing that timber where you now say he was framing it, there wouldn't have been a particle of smoke about him, would there?

A. At the east end?

Q. Yes, sir. Of smoke coming out of the tunnel at the west end, I mean?

A. Yes, sir, but it came over the bridge.

Q. Did it come over the bridge to the east end, or beyond the east end of the bridge?

A. It came right along on the bridge all the way.

Q. Did it come to the east end of the bridge, that smoke?

A. Yes, sir, I suppose it did.

Q. Could a man standing on the east end of the bridge have a clear vision of the track east of the bridge, around the curve; could he, or not, have seen No. 15 coming around the curve?

A. Yes, sir, he could have saw her.

Q. He would have been in plain view of it, would he not?

A. If the smoke had not struck him, he would.

Q. Did the smoke extend out to the curve?

A. No, sir, not that I know of.

Q. How far did the smoke go beyond the east end of the bridge and up the track?

A. I don't know.

Q. If a man was standing near the east end of the bridge, and it might have been on the ground, because you said just now that you were not sure whether it was on the ground, or not—would there have been anything to prevent a man standing in that position and looking east from seeing No. 15 coming around that curve?

A. If he had been standing in the bridge, I guess there would.

Q. I want you to indicate on this photograph just about where that framing was done. I will explain the photograph to you: This is the east bound track, and this is the west bound track. This is the curve east of the east end of the bridge. Now, indicate on that photograph about where these men were framing that timber. These are the braces. This is the first brace from the  
122 end of the bridge and this is the second brace.

Mr. McCORMICK: Does that photograph show the tunnel?

Mr. WERTH: No, sir.

A. If I recollect correctly, they were framing about here.

Q. Do you mean on that track?

A. Yes, sir.

Q. That, I have told you, is the east bound track. Now, I ask you if they were framing on the east bound track?

A. Oh, you say that is the east bound track?

Q. Yes, sir, you are looking east, the way that photograph was taken.

A. Well, they were on the west bound track.

Q. That is right now. Now, show me on this track—that is

the east bound track over there and this is the west bound track—where they were with reference to the end of that girder?

A. Well, they were somewhere right here, as well as I remember.

Q. Turn the photograph around to the jury and show them where you say it was.

By the COURT: Mr. Werth, I think you had better hold that photograph for the witness and let him point it out to the jury. They may see it better that way.

Q. Take your pencil and put it where you had it just now. This is the west bound track, and this is the east end of the bridge. Where were they framing guard rails?

A. To the best of my information, they were framing right in here.

Q. Your pencil seems to go beyond the east end of the girder. You mean to say they were framing the timber right at, or beyond, the east end of the bridge?

A. Well, you see it's right this way. They were framing, as well as I recollect, right on this end of the bridge, right this way.

MR. SMITH: That is right in the middle of the bridge now.

Q. That is right, you are in the middle of the bridge. Can't you put your pencil down where you want to say that they were doing that framing? These brackets shown on the photograph are about ten feet apart, and there are five of them which would make about fifty feet from the end of the bridge to this point here. Put your pencil in and show the jury about where they were framing that guard rail?

A. About in here, to the best of my information. I reckon  
123 that runs behind the girder.

Q. Behind the east end of the girder, is that right?

Q. Behind the east end of the girder, is that right?

A. It looks that way.

Q. East of the east end of the girder?

A. Yes, sir.

Q. Do you make that statement?

A. Yes, sir.

The COURT: I think we had better take a recess now.

(And at 12:45 P. M., with the evidence of witness Hinkle not completed, the court took a recess until 2:00 P. M.)

MONDAY, JUNE Twenty-third, 1913.

(Afternoon Session.)

Court re-convened at two o'clock P. M., pursuant to recess.

The plaintiff having begun the introduction of her evidence in chief, but not having concluded same, at recess, resumed the introduction thereof, as follows:

W. M. HINKLE, for Plaintiff, on stand from morning.

Being Re-examined by Mr. WERTH:

Q. If I understand you correctly, at the time that No. 15 came around the curve, somebody hollered "Railroad," and 92 was still on the bridge, on the east bound track, going east?

A. Yes, sir.

Q. How much of it was on the bridge at that time?

A. I guess something like half of it; I never paid any attention to it.

Q. How long was that train, No. 92?

A. I don't know.

Q. Was it a double header, with two engines to it?

A. Yes, sir.

Q. Was it a time freight?

Defendant's Objection.—Counsel for defendant object to the question, because a repetition of evidence gone over during the direct examination of this witness and the re-examination at the morning session.

Counsel for plaintiff says he thinks he did not ask that question.

Mr. McCORMICK: The witness says it was a long train, didn't you, Mr. Hinkle?

WITNESS: Yes, sir; he asked me that, it seems to me like.

Q. I don't recollect it, and now I want to ask again how long that train was?

A. I guess it might have been half a mile long, or longer.

Q. Had it all gotten out of the tunnel at that time, cleared the tunnel?

A. Yes, sir.

Mr. SMITH: At which time? The witness told you a little while ago, Mr. Werth, that about half of it was out when the other train came.

Q. You say that half of it was on the bridge at the time somebody hollered "Railroad" for No. 15, and that it was half a mile long, is that right?

A. I guessed it to be about that long.

Q. Well, if half of it was on the bridge, a quarter of a mile of it was on the bridge at that time, if it had cleared the tunnel.

Defendant's Objection.—Counsel for defendant object to the question, because argumentative, and an unfair deduction from the witness' statement; and, further, this is not properly re-examination; the only new thing brought out on the cross-examination being the warning given by Foreman Carbaugh.

Objection overruled.

Defendant excepts.

A. Yes, sir, that is right.

Q. Well, if that is right the smoke of that train beat the train to the east end of the bridge, did it not?

A. It came along with the cars, about that time.

Mr. McCORMICK: I didn't hear you.

WITNESS: I say, the smoke came along out of the tunnel with the cars.

125 Q. Now, I want to know if a man standing within eighteen or twenty feet of the east end of the bridge, or near the east end of the bridge, would have had any difficulty whatever in seeing No. 15 come around the curve going west on the west bound track at that time?

A. Yes, sir.

Q. What difficulty would he have had?

A. He would have had to look through the smoke. If he had been walking along there, he could not have saw that train.

Q. Suppose a man was standing where you say they were framing those timbers, east of the east end of the bridge, would there have been any smoke between him and the curve two hundred and more feet east of that bridge?

A. I don't think there was any smoke out from the tunnel on the bridge until it went along with the cars, of course.

Q. Then a man standing about the east end of the bridge, looking east, would have been looking into clear space, with no smoke in it, would he not?

A. Do you mean back and over the bridge?

Q. If a man was standing at or near the east end of the bridge on the track and looking east if there was no smoke beyond the bridge, he could have seen a train coming on the west bound track, could he not?

A. Yes, sir.

Q. There would be no trouble in the world about that. Was Tom Holbrook an extraordinarily careful man?

A. Yes, sir, he seemed to be careful.

Q. From August to January you had worked with him?

A. Yes, sir.

Q. Did you find him merely a common average bridge man, or an extraordinary and over the average bridge man? How about that?

A. He seemed to be a mighty careful man.

Q. He was very careful that day at dinner and reprimanded you about being slow in clearing that track that morning?

A. Yes, sir.

Q. He said that you had been slow?

A. Yes, sir.

Q. How did he happen to do that? Was that just his way?

A. No, he meant what he said.

Q. I know he meant what he said, or I suppose he did, but I asked was he in the habit of cautioning people who were careless, or reprimanding them, or rebuking them?

A. I don't remember of ever hearing him talking to anybody else about being slow about clearing up. I don't think he did.

Q. You have never heard of it?

A. No, sir.



Q. On that occasion did he rebuke you about being slower than you ought to have been that morning?

A. Yes, sir, he did.

126 Mr. McCORMICK: He hasn't said he rebuked the witness.

Mr. WERTH: Well, he has said it just now.

Mr. McCORMICK: That is because you put the word "rebuke" in your question, and he does not understand what the word rebuke means.

A. Mr. Holbrook told me I was too slow clearing up the bridge, and that I would get killed some day.

Q. He had reference to what had occurred that morning before you went to dinner?

A. (A pause without response.)

Q. I say, he had reference to that occurrence?

A. I don't remember his saying anything about it.

Q. What could he have been talking about if he was not talking about that? And when you were talking to Mr. McCormick a while ago didn't you state that he had reference to that?

Mr. McCORMICK: No, sir, he didn't.

Mr. WERTH: I object to these interruptions by counsel.

The COURT: Counsel for plaintiff has a right to ask the witness these questions, because the witness is practically on cross-examination.

A. Yes, sir, I reckon he did.

Q. Well, you told the jury, in giving an account of that occurrence, that you had been as quick as you could and did get out of the way of that train?

A. Yes, sir, I told them that.

Q. You were asked by counsel for defendant if everybody did not get out of the way of that coal train successfully, clear it all right, and you replied that they did?

A. Of this here west bound coal train?

Q. Yes.

A. Yes, sir, they did.

Q. At that time there wasn't any train on the east bound track, going east, was there?

A. No, sir.

Q. There wasn't any smoke on the bridge, was there?

A. None that I noticed.

Q. In addition to that the coal train gave repeated, loud, short blasts of the whistle, like an alarm whistle when it came around the curve, did it not?

A. Yes, sir, I heard a whistle.

Q. You heard more than one, didn't you?

A. I never noticed particularly about that.

127 Q. You said in answer to a question put to you by counsel for defendant that Mr. Holbrook told Carbaugh at dinner that second fifteen was going to be a passenger train; that is right, isn't it?

Mr. McCORMICK: He didn't say at dinner, but before it came.

Mr. WERTH: Well, before it came. That is totally immaterial.

Q. You told counsel for defendant that Holbrook told Carbaugh at some time before fifteen came that day, that when it did come it would be a passenger train?

A. Him and Mr. Carbaugh were talking to that effect. Mr. Holbrook said it would be a passenger train for the first train had no dining car. I believe that is what he said.

Q. He said that to Carbaugh?

A. Yes, sir.

Q. And he said that to Carbaugh before dinner?

A. Yes, sir, it was in the morning when they were talking.

Q. You told counsel for defendant that when you looked at the track after that smoke enveloped the bridge that the track was clear of men and timber as far as you could see, when No. 15 came along. You meant to say by that that there was no timber on the track, and no men on the track that could be struck by train No. 15 at the time when you looked and had reference to; is that right?

A. Not at the time I looked up under the smoke.

Q. I am talking about the time when you told counsel for defendant in his examination of you before this jury, that when you looked the track was clear of men and timber as far as you could see, when No. 15 came along. I am asking you now if you meant by that to state that the track was clear of timber that would be struck by No. 15 and clear of men that would be struck by No. 15?

A. I never saw anything but clear track while I was looking.

Q. By clear track you mean unobstructed by timber or men, is that right?

A. Yes, sir.

Q. Tom Holbrook was not hit by No. 15 at all, was he?

A. Yes, sir, I suppose he was.

Q. He was hit while he was on the west bound track, wasn't he, by No. 15?

A. Yes, sir.

Q. When you looked then you did not see a man who was on the track, and he must have been on the track; is that right?

A. I didn't see him any more until he came down by me.

128 Q. When he came down by you, is that the time that you spoke of when the track was clear?

A. No sir.

Q. When was that time that you spoke of the track being clear?

A. Just as I went into the clear, as I got down into the clear.

Q. You told counsel for defendant it was clear of men and timber when 15 came along. Those were the very words you told counsel for defendant, when 15 came along you said the track was clear of men and timber?

A. (A pause without response.)

Q. Didn't you make that statement?

A. Well, it could not have been clear while 15 was coming on the bridge, or it wouldn't have hit Tom.

Q. It wouldn't have come, did you say?

A. No, it wouldn't have hit Tom if he had been off the bridge.

Q. Of course, we all know that. I am assuming now that what you meant by making that statement was that it was clear of timber and men—you used those identical words—when 15 came along, or rather, I want to know what you meant by them. You said you looked?

A. I did look, but I didn't see anybody.

Q. If you overlooked a man on the track, you might have overlooked timber, might you not?

A. (No response.)

Q. Answer the question, please.

The Court: I think that question is argumentative.

Q. I will ask you to state to the jury if you are now certain that at the time you refer to that track was clear of men and timber?

Defendant's Objection.—Counsel for defendant object to the question, because misquoting the witness.

By the Court: Counsel for defendant and myself are under the impression, Mr. Werth, that what the witness said was as of the time when the call "Railroad" was given; that it was when Mr. Carbaugh first discovered No. 15 was coming, when this witness looked down and saw nothing in the way of men or timbers.

Q. I understood you to say to counsel for defendant that when Carbaugh hollered "Railroad" the track was clear of men and timber, is that right? Did you make that statement?

A. Yes, I made that statement.

129 Q. And Holbrook was struck by No. 15 wasn't he?

A. Yes, sir, I suppose he was.

Q. Where was Holbrook when Carbaugh hollered "Railroad?"

A. He was between me and one of those other boys.

Q. Well, where was he on the bridge?

A. When they hollered "Railroad?"

Q. Yes, when Carbaugh hollered "Railroad," you say he was coming along, and I want to know just where he was on the bridge?

A. He was up on the east end of the bridge somewhere.

Q. Was he somewhere on the east end of the bridge, and, if so, how far from the east end of the bridge where you saw him?

A. Well, he was up there, as well as I remember, working around and helping to get things in clear.

Q. I asked, how far was he from the end of the bridge?

A. Somewhere there about the end of it.

Q. He was there about the end of the bridge, and walking along on what?

A. Who was walking?

Q. Mr. Holbrook was walking along on what; you say he was walking along, what was he walking on?

Defendant's Objection.—Counsel for defendant object to the question, because witness seems to misunderstand the same, evidently thinking that counsel for plaintiff is talking about Carbaugh.

Q. I mean, Mr. Holbrook.

A. He was standing up there. There was a bunch of them.

Q. What was he standing on?

A. Standing on the bridge.

Q. Was he standing on the east bound track, or the west bound track, between the rails, or on the outside of the rails?

A. On the west bound track.

Q. Between the rails or on the outside of the rails?

A. Down in between the rails, as well as I remember.

Q. Between the steel rails, right in the middle of the track?

A. Yes, sir.

Q. Who was there, when Carbaugh hollered "Railroad!" was that Mr. Holbrook, and which way was he going, you say he was walking along?

A. He was walking right along towards the upstream side. I didn't notice which way he went.

Q. Towards what?

A. The upstream side of the bridge.

Q. You say he was standing in the middle of the west bound track and walking along. Now, just what do you mean by walking towards the upstream side of the track? Was he crossing  
130 the track and going towards the north girder?

A. No, sir, I think he was going towards the south girder.

Q. Then he was going towards the east bound track; is that right?

A. (A pause without response.)

Q. Was he going east or west, north or south?

A. Well, from where he was standing, it looked like he might have been going south.

Q. That would have been towards the east bound track?

A. (A pause without response.)

Q. Do you know what direction he was going, or what he was doing?

A. No, sir, not at that time, I don't.

Q. How far was that from the east end of the bridge, just as near as you can tell me?

A. Twenty feet, I guess.

Q. Then he was in the smoke, he was enveloped in the smoke; is that true?

A. I don't hardly think there was any smoke—yes, he could not have—

Q. (Interposing.) Well, which is it now? Was he in the smoke, or not?

A. Yes, sir, he was out in the smoke.

Q. He was wrapped up in it so a man could not see from where he was?

A. Oh, he might have saw some little.

— Suppose he had been facing east, could he have seen No. 15 coming around the curve, in that smoke where he was?

A. No, sir, he might not have saw it.

Q. Did you go and help pick his body up?

A. Yes, sir.

Q. Did you see blood on the girder bracket?

A. Yes, sir.

Q. Did you see brains there?

A. Yes, sir.

Q. Do you know how many brackets that was from the west end of the bridge?

A. No, sir, I don't.

Q. Where you saw that blood?

A. I have no idea how many brackets there were.

Q. Can't you give me an idea; you said about how far he was from the east end of the bridge. How far was his body picked up from the west end of the bridge?

A. It might have been eight or nine brackets, but I have no idea.

Q. Eight or nine brackets from the west end of the bridge; is that right, as near as you can tell?

A. As near as I can tell.

Q. Those brackets are ten feet apart, and that would be ninety or one hundred feet from the west end of the bridge; is that right? They are about that far apart, are they not?

A. I don't know how far they are apart.

Q. They are ten feet apart and there is no dispute about that. It is also undisputed that that bridge is two hundred and twenty-eight feet long. That would put his body about the middle of the bridge, wouldn't it?

A. No, sir.

Q. I believe you stated that you thought his body was  
131 picked up—how many feet did you say from the east end of the bridge?

A. Eighteen or twenty feet, I believe.

Q. Eighteen or twenty feet from the east end of the bridge?

A. Yes, sir.

Q. You also stated a little while ago that the last time you saw him, when you think he was going south, that he was standing twenty feet from the east end of the bridge, is that right?

A. He was standing at the east end; after I seen him up there at the east end of the bridge, as well as I remember, after it got smoky.

Q. After that time you mentioned here when you think he was going south on the east bound track, and when within about twenty feet of the east end of the bridge, he went nearer to the east end of the bridge than that before No. 15 got on the bridge; went still nearer to the east end of the bridge, did he not?

A. No, sir.

Q. Just explain then, in heaven's name, what you do mean.

A. What?

Q. Explain what you do mean.

A. Well, I mean that I just seen the man there.

Q. How far was Tom Holbrook from the east end of that bridge the last time you saw him before he was hurt?

A. I guess twenty-five feet, may be.

Q. And when his body was picked up, you say that was twenty feet from the east end of the bridge; is that right?

A. Of the west end of the bridge, from where he was picked up.

Q. I say where he was picked up.

A. At the west end of the bridge.

Q. Then I understand you to tell the jury now that when his body was picked up, it was picked up within twenty feet of the west end of the bridge; is that right?

A. Close to twenty feet. I would say it was twenty feet, or don't say it was exactly twenty feet.

Q. Well, the important point now is whether it was the east or the west end of the bridge that his body was within twenty feet of. You said awhile ago it was the east end. Now, I understand you to say it was the west end. Which was it?

A. Tom Holbrook was picked up at the west end of the bridge.

Q. Well, that is where he was picked up, and you think in about twenty feet of the west end of the bridge? When you saw him, and they hollered "Railroad," you say he was standing within twenty feet of the east end of the bridge?

A. Within twenty or twenty-five feet, or something like that.

Q. That bridge is 228 feet long, or so stated by counsel  
132 for defendant in the opening statement to the jury, and he was knocked within twenty feet of the end of the bridge. So he was knocked one hundred and eighty or two hundred feet by that engine, according to your statement; is that right?

A. No, sir.

Q. Well, why is it not right? You say he was within twenty feet of the end of the bridge.

Defendant's Objection.—Counsel for defendant object to the question, because argumentative and not proper re-examination.

Counsel for plaintiff says he will withdraw the question.

Counsel for defendant say there is no use of withdrawing it, because the witness says he didn't say that.

Counsel for defendant now object to the whole re-examination by counsel for plaintiff and ask that same be stricken out, because not relevant, for the reason that the only point brought out by defendant on cross-examination was with respect to the warnings given by the foreman.

Objection overruled.

Defendant excepts.

Recross-examination.

By Mr. McCORMICK:

Q. Is the tunnel at the east end or the west end of the bridge?

A. It is at the west end.

Q. How far was Holbrook's body from the tunnel when it was taken up, and you helped to take it up, as I understood you to say?

A. I helped to pick Mr. Holbrook up?

Q. Yes.

A. From the tunnel to his body, how far was it?

Q. From the tunnel to the bridge it is shown to be forty-one feet.

Q. Was his body taken up on the bridge?

A. Yes, sir.

Q. How far inside of the bridge was his body taken up?

A. About twenty feet, as well as I remember.

Q. Then forty-one feet and twenty feet would make sixty-one feet from the tunnel at the west end of the bridge to where

133 his body was found. Am I right or wrong about that?

A. You are right, as well as I remember.

Q. Stand aside.

Re-re-examination.

By Mr. WERTH:

Q. Mr. Hinkle, whom have you talked to in reference to your testimony in this case, I mean whom have you talked to as representing the railway company?

Defendant's Objection.—Counsel for defendant object to the question, because it is wholly irrelevant and immaterial; the question here being what his evidence is.

Objection overruled.

Defendant excepts.

A. Whom have I talked to?

Q. Yes, sir; representing the railway company?

A. I don't believe I remember talking to anybody.

Q. Do I understand you to say that you have talked to nobody at all representing the railway company?

A. As I said, I don't remember talking to anybody.

Q. Well, that is what I am asking you. Do you mean to be understood as saying that you have talked to nobody representing the railroad company about your testimony in this case and what it would be?

A. No, sir.

Q. Did you talk to that gentleman sitting over there behind counsel for defendant, and who is in his shirt sleeves?

A. Yes, sir, I believe I did a little.

Q. How much did you talk to him?

A. Oh, not much. About as much as I did to you.

Q. Did you talk to anybody who advised you not to tell counsel for plaintiff in this case what you would testify to?

A. I never understood anybody to say that.

Q. To say that you were not to talk to counsel for plaintiff in this case?

A. I don't remember.

— Do you mean to say you have no recollection about it?

A. No, sir.

Q. Can you answer, yes, or no? Did anybody tell you not to talk to Mr. Werth, myself, about this case?

A. Yes, sir.

134 Q. Well, who was it?

A. I believe he is sitting over there, but I don't know him.

Q. That man over there?

A. Yes, sir.

Q. Do you know his name?



A. No, sir.

Q. He told you not to talk to Mr. Werth about this case, didn't he?

A. (A pause without response.)

Q. All right, stand aside.

Re-recross-examination.

By Mr. McCORMICK:

Q. Mr. Hinkle, were you in the office of Mr. Smith and Mr. McCormick some day last week, probably last Wednesday or Thursday, and did they go over this case with you?

A. Yes, sir.

Q. They talked to you about it?

A. Yes, sir.

Q. Were you told by Mr. Smith and by Mr. McCormick both, or the one or the other of them, that you had a right to talk to counsel if you chose, counsel on the opposite side in this case?

A. Yes, sir, you told me that.

Mr. WERTH: I want to say for the benefit of counsel on the other side, that not for one moment did I imply, or do I mean to imply, that counsel for the railroad company advised this witness not to talk to me.

Q. Why did you—or, I mean, I told you that you had a right to talk to counsel on the other side in this case if you chose to do so, did I not?

A. Yes, sir.

Q. That is all.

Mr. WERTH:

Q. But that gentleman over there told you not to talk to Mr. Werth?

A. Yes, sir.

Q. Stand aside.

Mr. McCORMICK:

Q. Did Mr. Haller, to whom Mr. Werth referred, tell you not to talk to Mr. Werth, or that you need not talk to him if you chose not to do so?

A. He said I did not have to talk to him without I wanted to.

Q. Well, that is what I supposed he said. You may stand aside.

(Witness leaves the stand.)

135    PIERCE WALTERS, for Plaintiff.

Direct-examination.

By Mr. WERTH:

Q. Are you one of the bridge crew that was on 899-A on January 4, 1913, when Tom Holbrook was killed?

A. Yes, sir.

Q. You were an eye-witness of that accident?

A. I did not see the train strike him.

Q. You mean that you were on the bridge at the time?

A. Yes, sir.

Q. Do you know that the plaintiff, Mrs. Holbrook, is represented by Mr. W. H. Werth as her counsel, that is, myself?

A. Yes, sir.

Q. Did Mr. W. H. Werth ask you in this court building several days ago to please give him a statement of the facts as you recollected them involved in that accident.

A. Yes, sir.

Q. Did you refuse, or give him a statement?

Defendant's Objection.—Counsel for defendant object to the question, because matter hereby intended to prejudice the minds of the jury, and counsel further state the witness had a right to refuse to give counsel for plaintiff the information.

By the COURT: I think the question may be answered. Counsel for plaintiff wants the jury to know at the outset exactly what the status of the witness as to himself is; whether he is a man who has been with counsel for plaintiff all the time, or if a stranger.

Defendant excepts.

Q. Did Mr. Werth on that occasion repeat his request over and over again and tell you it was the duty of every citizen to bring out the truth for both sides, and did he repeatedly ask you to give him a statement in order that he might intelligently represent the widow and children of Tom Holbrook, and did you not as often refuse?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir.

136 Q. Did anybody representing the Norfolk & Western Railroad Company advise you to refuse to give Mr. Werth a statement of what you would testify to in this case when you came on the stand, and, if so, who?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes.

Q. Who was it that advised you not to talk to Mr. Werth, counsel for plaintiff in this case?

A. Mr. Haller.

Q. Do you mean the gentleman who has a seat in the bar of this court with counsel for defendant and is helping them to conduct the case for the defendant, the gentleman over there in his shirt sleeves? Is that the man who advised you not to talk to Mr. Werth?

A. Yes, sir.

Q. That is all.

## Cross-examination.

By Mr. McCORMICK:

Q. Mr. Walters, didn't Mr. Haller tell you that you could talk to counsel if you chose?

A. Certainly.

Q. But that you were not obliged to talk to them unless you did choose?

A. Yes, sir.

Q. Isn't that all he did tell you?

A. That is all.

Q. Mr. Walters, do you remember being in my office the other morning and my having a talk with you, and that I told you then that you had a right to talk to counsel on the other side of the case if you wanted to talk to him? Do you remember that?

A. Yes, sir.

## Re-examination.

By Mr. WERTH:

Q. I understood you to say on your examination in chief that Mr. Haller advised you not to talk to Mr. Werth, counsel for plaintiff in this case? Did I understand you correctly?

A. I never made any of that kind of statement.

Q. Then I understand you incorrectly. I understand you  
137 to say now that Mr. Haller told you you need not do it unless you wanted to?

A. Yes, sir.

Q. When Mr. Werth talked to you did he advise you that in his opinion it was the duty of the witness who had been summoned for the plaintiff and brought to court to tell the plaintiff's counsel, or the defendant's counsel, too, for that matter, what he knew about the case?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir, I think that is true.

Q. And after Mr. Werth so advised you, you repeatedly declined to give him any statement whatsoever. Is that right?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir.

Q. And you took that course as the result of a conference with Mr. Haller, whom you knew at the time to represent the railway company? Is that right?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, sir.

Q. You may stand aside.

(Witness leaves the stand.)

In Judge's Chambers.

Counsel for defendant moves the court to strike out all of the testimony of the witness Pierce Walters because improper.

Counsel for plaintiff moves the court for permission to  
138 recall witness Walters with the right to examine him as an adverse witness.

By the COURT: I am with the defendant on the proposition that the evidence already given by witness Walters is not material and not admissible, but I am with the plaintiff to the extent that if he intends to examine Walters on the merits of the case, the testimony that has gone in may remain in order that the jury may know the position the witness occupies.

Defendant excepts.

Court and counsel return into the court room.

PIERCE WALTERS, for plaintiff, recalled for further direct examination by Mr. Werth.

Q. Now, Mr. Walters, that you are in court, I ask you to tell the jury briefly, what occurred from the time you went on bridge 899-A, near Pando, W. Va., up to the time second 15 ran and struck Tom Holbrook, just as near as you recollect it?

A. Well, on the morning of January 4, 1913, we were first ordered to work at seven o'clock. We loaded some bridge timber, eight by ten, ten feet long, one carload. While we were loading this timber first No. 15 ran displaying signals. The foreman, Carbaugh, who was acting foreman—he was assistant foreman and acting foreman at that time—and Mr. Holbrook discussed the case, and they said that second 15 would be a passenger train because first 15 was not carrying a dining car. After loading the timber we went to framing guard rails on the bridge. At twelve o'clock we quit work for dinner, and Mr. Holbrook at the dinner table was telling Mr. Hinkle he would have to be more careful in clearing up for trains and getting out of the way on both tracks. After dinner we went to work at twelve-thirty, and we were framing guard rails, six by eight, twenty feet long, about near the middle of the center span. We had them laying on the west bound track, on two blocks, one at each end, I mean this timber we were framing. No. 92 came through the tunnel at the west end of the bridge on the east bound track, and Carbaugh said "Clear up." Tom Holbrook was at the east end of the guard rail, and I was at the west end. We laid it in the clear. Holbrook, or Carbaugh, got the block on the east end and threw it under the bridge, and Holbrook came from the east end of this guard rail to the west end and said "Let's clear  
139 up. Dan said clear up." I am speaking of the assistant foreman who was acting that day as foreman. I did not say

anything to Mr. Holbrook. He reached down and got a block where I was and laid it in the clear. I stopped down and got a foot adz and a square and laid them in the clear and just stepped back to the web of the girder and stood on the floor beam, looking east, and at that time No. 92 had pulled a cluster of smoke out of this tunnel in between itself and passed through the girder span. Tom Holbrook went westward on this old guard rail that had never been torn up yet. I never saw him any more until after 15 was clearing me, until the sleeper car cleared me. I then looked around and saw it had swept somebody down on the floor beam out there. I went on out there as quick as I could, and it was Mr. Holbrook.

Q. If I understand you correctly, Mr. Walters, you frame these two guard rails by putting two pieces of timber that you call blocks, across the track, and then put new guard rails on top of them, and then you go to work to framing; is that right?

A. Yes, sir; that is for sawing and adzing.

Q. That is for sawing and adzing?

A. Yes, sir.

Q. On the occasion referred to, I understood you to say that this framing was done about the middle of the bridge, is that right?

A. Yes, sir, right near it.

Q. Right near the middle of the bridge?

A. Yes, sir.

Q. It was not on the east end or about the east end of the bridge?

A. No, sir.

Q. Now, you have spoken of Mr. Hinkle who was cautioned by Mr. Holbrook at dinner?

A. Yes, sir, he was.

Q. What was the occasion of his giving him that caution?

A. Well, he was a little slow about clearing up sometimes, clearing both tracks.

Q. When had he most recently been slow about clearing up?

A. That morning.

Q. Now, I want you to tell the jury about a little occurrence there that possibly you forgot about, that occurred that morning, that Mr. Holbrook had reference to when he told him about being more cautious. Tell the jury about that occurrence that morning when the coal train came in there.

A. Well, a west bound coal train, of empties, or most of them I suppose, though I never paid any attention to it, went west, and a piece of guard rail lay on the heads of the ties, something like I would say eighteen inches from the ball of the rail, and this here coal train—there was some obstacle that hung down, or a chain may

be from a door may be, I didn't pay any attention to what caught it, and it might have been a bolt or something, but it moved this guard rail west on those ties probably from four to six, or may be eight feet.

Q. Was that all of that occurrence?

A. That was all.

Q. What sort of whistle did that engineer of that coal train give when he came around the curve on the west bound track?

A. I never paid any attention to the whistle.

Q. Well, you heard it didn't you?

A. I don't recollect of it.

Q. Do you know the alarm whistle, repeated short blasts of the whistle, given repeatedly and shortly; you know that whistle and know what it means, don't you?

A. Yes, sir.

Q. Didn't you hear it that morning when the engineer came around the curve going west on that west bound track?

A. I can't remember it positively.

Q. What is your best recollection about it?

A. I don't recollect hearing it.

Q. You don't recollect hearing any whistle at all from that engineer of that coal train?

A. It was about up at that other bridge when it whistled.

Mr. McCORMICK: Are you talking about the coal train in the forenoon?

Mr. WERTH: Yes, sir, the train in the forenoon that hit the piece of guard rail.

Q. Go ahead.

A. They had whistled probably three or four, or may be four or five times at the west end of this bridge east of there.

Q. That bridge wasn't in sight of there, was it? That bridge east of there is not in sight of there, is it?

A. Not in full view.

Q. It is not in sight at all, is it? You can't see a single piece of timber in it, can you?

A. No, sir.

Q. If the train had been whistling, what could it have been whistling at? I mean, if it had been whistling back there?

A. (A pause without response.)

Q. You wouldn't have seen it there at all then?

A. No, sir.

Q. Could you imagine what it could have been whistling back there for? The engineer could not have been whistling for the approach of bridge 899-A from that point?

A. He could not have seen the bridge from that point, but could when he got in the cut there.

141 Q. I know, when he came around the curve he could.

Now, Mr. Walters, I want to refresh your memory and ask you if the engineer of the locomotive pushing that train west on the west bound track was not in full view of the four men carrying a guard rail on that bridge, a part of your gang, and if he didn't blow the whistle at those men and at that distance?

A. I helped to carry the guard rail in there.

Q. Your back would have been towards the train?

A. Yes, sir, but I didn't see him at the time he done any blowing.

Q. You could have heard him?

A. Yes, sir.

Q. Did you hear any whistle?

A. I heard him back up in the cut near the west end of that bridge there.

Q. You were at that time at about what part of the bridge when you heard it?

A. Well, I was about a quarter of the way from the—(Witness pauses.)

Q. A quarter of the way from the east end of the bridge?

A. Yes, sir.

Q. What do you mean by a quarter of the way from the east end of the bridge?

A. Yes, sir.

Q. I asked you, what do you mean? Is it fifty or sixty feet from the east end of the bridge?

A. Yes, sir, more or less.

Q. You had brought that guard rail from the outside, from beyond?

A. Yes, sir.

Q. And four men had hold of it?

A. Yes, sir.

Q. And you were walking along between the rails of the west bound track, going west?

A. Yes, sir.

Q. During that time that you were carrying that guard rail there, you heard those blasts of the whistle?

A. Yes, sir.

Q. And did not turn around to see where the train was?

A. No, sir.

Q. You don't know where it was when you heard that?

A. I could not say positively.

Q. How near did that train come to hitting some of the men on the rear end of that guard rail?

Defendant's Objection.—Counsel for defendant object to the question as immaterial, because the occurrences in the morning had nothing to do with the case.

By the COURT: The question may be answered and the jury will understand the same warning given them Saturday and this morning in reference to the occurrence in the morning.

Defendant excepts.

A. Well, I would think it was something like forty feet.

142 Q. Isn't it a fact that in order to keep themselves from being hit, they had to drop that guard rail and leave it in a position where it might be, and was hit by that train?

A. No, sir, it wasn't necessary to drop that guard rail whatever.

Q. The guard rail was left where it did not clear that train, was it not?

A. It would have cleared it if it had not been for a hanging bolt or chain.

Q. Where did you go when you went to clear for that train, on the east bound track, or just where did you go?



A. I went right across over the east bound track, and over against the other girder.

Q. On the other side of the bridge?

A. Yes, sir, over to the web of the girder.

Q. How large was that guard rail that you brought in?

A. Six by eight and twenty feet long.

Q. Did Tom Holbrook help you to bring it in?

A. I don't recollect whether he did, or not.

Q. At dinner time Tom Holbrook was talking to this man Hinkle and told him if he did not mind, he was going to get killed yet?

A. Yes, sir, he said he must use more care in clearing up.

Q. He was talking to him about that very occurrence that morning?

A. Yes, sir.

Q. That very identical occurrence?

A. I suppose that is what he had reference to.

Q. He told Hinkle if he didn't use more care he was going to get killed, didn't he?

A. Yes, sir, I believe he did.

Q. Now, after 92 came out of the tunnel, or just as it came out of the tunnel, who were framing the guard rails in the middle of that bridge on those blocks across the west bound track that you have described?

A. Holbrook and myself, for two.

Q. Who else?

A. I think Mr. Harrison was probably helping. I won't say for certain, but he was doing some robbing, him and Mr. Porter and Mr. Hinkle.

Q. Who else was there? How many men did you have framing that guard rail?

A. There were six of us in all.

Q. In the gang?

A. Yes, sir.

Q. I understand, but I am asking you how many men were at work framing the guard rail when No. 92 came out of the tunnel?

A. Holbrook and myself were all that I seen right at the guard rail.

Q. At the time 92 came out of the tunnel?

A. Yes, sir.

Q. Had you quit framing it?

A. No, sir, we were working on it.

143 Q. Was one man the only man you had working on it, framing it?

A. No, myself and Mr. Holbrook.

Q. You and who and Mr. Holbrook?

A. Myself and Mr. Holbrook.

Q. Just you two?

A. Yes, sir.

Q. Then there were just two men working framing that guard rail?

A. Yes, sir.

Q. How many daps did you put in a guard rail twenty feet long?

A. Just according to how many ties were in the space.

Q. Well, that is about the same thing. I asked you how many ties, or daps, which would be the same thing?

A. Well, if the ties have a ten inch surface they are supposed to be fifteen feet centers.

Q. How many ties would a twenty inch guard rail be supposed to catch and hold in place with daps?

A. A twenty foot guard rail, or a twenty inch guard rail?

Q. A twenty foot, I said. How many ties would that guard rail cover and hold in place, about?

A. Well, about fifteen.

Q. Then, there would be fifteen daps in the guard rail?

A. Yes, sir.

Q. How deep are the daps sunk into the guard rail?

A. If the guard rail is plumb size it is one inch.

Q. That leaves five inches clear above the cross-tie?

A. Yes, sir.

Q. How long does it take a man to saw out and then take an adz and adz out or mortise out one of those daps?

A. Well, say two men at the saw, and I suppose one man would adz it out in a minute or less time.

Q. How long would it take you and Tom Holbrook—and you say that you and he were the only two doing that work—how long would it take you to frame that guard rail?

A. Something like twenty minutes.

Q. Twenty minutes?

A. Or may be a little more.

Q. You would saw it out and adz out fifteen daps in a guard rail in twenty minutes?

A. Something near it.

Q. How many guard rails had you put down that day up to that time?

A. I don't recollect the number.

Q. Well, about, as near as you can recollect?

A. Some five or six.

Q. Some five or six on that bridge that day?

A. Yes, sir.

Q. Now, when No. 92 came out of the tunnel, tell me just what occurred, or what was said or done by any one there?

A. When No. 92 came out of the tunnel?

144 Q. Yes.

A. Mr. Carbaugh was standing on the east bound track before No. 92 came out of the tunnel, when he seen it in the tunnel, you understand?

Q. Yes.

A. And he called to the men to "clear up," which they did.

Q. What train were they clearing up for?

A. No. 92, clearing, both tracks for one train.

Q. That is right, is it?

A. That is right.

Q. And at that time, when he gave that order to clear up to the men, he meant, and you understood him to mean, that he was clearing up for No. 92 going east on the east bound track?

A. No, sir, clearing both tracks.

Q. Well, what was the occasion for clearing up; was it because No. 92 was coming out of the tunnel?

A. Yes, sir. But he didn't know what was coming west.

Q. At that time he had neither seen nor heard second No. 15?

A. No, sir.

Q. And he had no time on second No. 15, did he?

A. No, sir.

Q. He just saw the signals on first No. 15, which said that it would be followed by a second section sometime or other?

A. Yes, sir.

Q. He didn't know when; is that correct?

A. Yes, sir.

Q. When Carbaugh said "clear up," just tell me exactly what was done next?

A. Holbrook and myself laid this twenty-foot guard rail in the clear, and Holbrook—

Q. Just where did you lay it?

Mr. McCORMICK: Let the witness finish his answer, please.

Mr. WERTH: Please do not interrupt me, as I am examining him now.

Mr. McCORMICK: I understand, but just let the witness finish his answer.

The COURT: I take it that Mr. Werth wanted, just at that juncture, to make definite about the point where the guard rail was placed, and I think that was his privilege.

Q. Where did you lay the guard rail?

A. On the outside, near the edge of the ties, near the ends of the ties.

Q. Near the ends or heads of the ties?

A. Yes, sir.

Q. You didn't mean near the end of the bridge?

A. No, sir.

145 Q. It was near the middle of the bridge?

A. Yes, sir.

Q. On which side of the track did you lay it?

A. On the north.

Q. When you commenced clearing up at that time, where was 92?

A. About the time we laid the guard rail down No. 92 was about out of the tunnel, the engine was.

Q. What sort of train was 92? You have spoken of it here as 92 several times, but haven't said what sort of train it was?

A. A time freight.

Q. A double header, or a one engine train?

A. A double header.

Q. A long train or a short train?

A. Well, sometimes it is long and sometimes it is not.

Q. That day how was it?

A. A tolerably long train.

Q. What would you call a long train?

A. Anywhere from forty to fifty to sixty or seventy cars.

Q. You think it was that day a tolerably long train?

A. Yes, sir, I would judge may be forty, or may be fifty cars.

Q. But not as many as seventy cars?

A. No, sir.

Q. Not as long as usual, may be?

A. No, sir.

Q. Was that train going down grade or up grade?

A. Up grade.

Q. On the west bound track then of course would be the down grade?

A. Yes, sir.

Q. How far did you say No. 92 had gotten, about out of the tunnel?

A. Just about out of the portal.

Q. When you and Tom Holbrook laid the guard rail on the track?

A. Yes, sir.

Mr. SMITH: I would like to ask there, what did you mean by getting out of the tunnel?

Q. The whole train you meant, didn't you?

A. No, sir, the engine.

Q. You didn't mean that the whole train had gotten out of the tunnel?

A. No, sir.

Q. You began to clear up before No. 92 got out of the tunnel?

A. Just as the engine came out of the tunnel we were in the clear, just about the time we dropped the guard rail.

Q. Where were both engines of No. 92? Were both of them on the front of the train, or was one behind and one in front?

A. Both in front.

Q. The box cars had not gotten out of the tunnel?

A. No, sir.

Q. The bridge had not yet been covered up with smoke?

A. Oh, no.

146 Q. When you and Tom Holbrook laid that guard rail on the north side of the west bound track, on the ends of the ties, what did you do next?

A. Mr. Holbrook, or Mr. Carbaugh, moved this east block away, where the guard rail was laying on and——

Q. (Interposing.) Holbrook or who?

A. Or Mr. Carbaugh, and I wouldn't say positively which one.

Q. Have you no recollection which one it was?

A. No, sir.

Q. You say that Carbaugh had been on the east bound track.

A. Yes, sir.

- Q. And when 92 came, where did he go?  
 A. He stepped on the west bound track.  
 Q. Whereabouts?  
 A. Right at the east end of this guard rail we were framing.  
 Q. Close to you all?  
 A. Yes, sir, within about twenty feet of myself.  
 Q. Where did he go from there?  
 A. He went east.  
 Q. Towards the east end of the bridge?  
 A. Yes, sir.  
 Q. Did you see him going east while you all were still there?  
 A. No, sir.  
 Q. When did you see him going east?  
 A. Just as I was clearing up myself.  
 Q. When you laid this guard rail on the north side of the west bound track, you say Holbrook or Carbaugh moved the east block?  
 A. Yes, sir.  
 Q. That was across the track?  
 A. Yes, sir.  
 Q. Why is it that you do not know which one of them did it?  
 A. Because I didn't pay any attention at the time.  
 Q. What did they do with it when they moved it?  
 A. They threw it in the hole.  
 Q. They threw it where?  
 A. Threw it under the bridge.  
 Q. What did they do that for?  
 A. Because they didn't need it any longer.  
 Q. Were they done?  
 A. That was the last piece of wood to frame.  
 Q. What were those blocks made for?  
 A. They were pieces of old guard rail we were taking up.  
 Q. Pieces of old guard rail you were taking up?  
 A. Yes, sir.  
 Q. And you used it for blocks?  
 A. Yes, sir.  
 Q. How long was it?  
 A. I suppose something like five feet.  
 Q. What happened next after Carbaugh or Holbrook, and you say you don't know which, moved that east block?  
 147 A. Mr. Holbrook came up to where I was, to the west end of this piece of guard rail, where that block was lying, and he said, "Dan says to clear up." He got this block at the west end where I was, and—

The COURT (interposing): Start that over again, please.

A. Holbrook came from the east end of this guard rail to the west end where I was. He said, "Dan says to clear up." He got this block where this guard rail was lying on, at the west end, and laid it in the clear. I moved a foot adz and a square and laid them on the heads of the ties. When I say heads of the ties, I mean out from this old guard rail.

Q. At that time was there any smoke on the bridge?

A. Mighty little.

Q. Where did you go after that, after you had moved the adz, and what else did you say?

A. The square.

Q. After you moved the adz and the square, where did you go?

A. I stepped right north on the east end of the floor beam.

Q. By one of the braces?

A. By that brace, and was standing looking east and holding with this hand (indicating left) over this brace. I was on the left side of the brace and holding with this hand right over the brace in order to stay there, you know, to keep from losing my balance.

Q. Could not but one man clear at those places there? At those places that you call braces could not but one man clear at a time?

A. Yes, sir, one man could have cleared on the east side, on the other side.

Q. On the other side?

A. Yes, sir, right opposite me.

Q. What did Tom Holbrook do when you started to cross the west bound track, north? Where did you leave him?

A. When I stepped on the floor beam, he walked west on the guard rail.

Q. He walked west on the old guard rail?

A. Yes, sir.

Q. On which guard rail, north or south?

A. On the outside that is on the north side.

Q. Going west from where you had been working?

A. Yes, sir.

Q. Had you put down any guard rails out that way that day?

A. No, sir.

Q. At that time was the bridge covered with smoke?

A. It was getting right smoky.

Q. Was Holbrook in the smoke?

A. Yes, sir, but it wasn't smoky enough but what you could see any obstacle, though, at a right smart distance.

148 Q. Holbrook's back was towards the east end of the bridge at the time he was walking along there?

A. Yes, sir, while he was walking west.

Q. Do you know how far he walked west?

A. No, sir, I didn't see him any more until No. 15 ran, and I saw him laying on the place.

Q. When you stepped across the north side to the west bound track and got on that brace how long had you been there before No. 15 came around the curve, or heard somebody holler?

A. I would say something like a minute, more or less.

Q. It might have been considerably less, might it not?

A. No, sir, I don't think it was anything less.

Q. You just stated a few seconds ago it was more or less?

A. Yes, sir, it might have been a few seconds less than minute.

Q. And somebody hollered "Railroad?"

A. Yes, sir.

Q. How much time was there between the cry "Railroad" and

the time you saw 15 dash by where you were? Now, answer my question like I asked it: How long was the time between the time when you heard somebody holler "Railroad" and the time when the pilot of the engine passed you, if you saw it pass you?

A. Well, probably ten seconds.

Q. Do you think it was ten seconds?

A. Something like that.

Q. How fast does 15 go; how fast was that train going that day?

You say you noticed, and know it is going down grade, did you say?

A. Which, first 15?

Q. No, second 15, and the one that killed Holbrook. How fast was that train going in your judgment?

A. Between thirty and thirty-five miles an hour.

Q. Between thirty and thirty-five miles an hour?

A. That is what I judge.

Q. Do you know what its schedule calls for at that point?

A. Forty miles an hour between Welch and Williamson.

Q. And this was between Welch and Williamson, was it not?

A. Yes, sir.

Q. That train was behind time, wasn't it?

A. Yes, sir.

Q. What makes you think it was going less than the usual speed then?

A. A certain amount of time was put out on it.

Q. Two hours and forty minutes late was put out on that train?

A. Yes, sir.

Q. You found that out afterwards?

A. Yes, sir.

Q. You didn't know it at the time?

A. No, sir.

Q. What makes you think it was going at less than usual speed?

A. Because forty miles an hour is the maximum speed.

149 Q. What makes you think it was going at twenty per cent. less than the maximum speed? You said it was going at the rate of thirty or thirty-five miles an hour. Thirty miles an hour would make it going twenty-five per cent. less than the maximum speed. Now, what makes you think it was going that slow that day?

A. Because that is all I think it was running.

Q. You think it because you think it?

A. Yes, sir.

Mr. McCORMICK: What else can he do except to give you his estimate, which he is doing?

Mr. WERTH: All right, I am just developing it.

Q. How fast does it usually run along there between Welch & Williamson?

A. Well, they can run anywhere from one mile to forty miles an hour. It is just with the engineer.

Q. How fast do engineers usually run who run train No. 15 between Welch and Williamson?

A. I don't exactly know what the schedule is.



Q. Well, I am asking you how fast do they usually run between Welch & Williamson. You are a bridgeman.

A. They very seldom make over thirty-five miles an hour.

Q. How long would it have taken that train to have run from a point ten, fifteen, twenty or thirty feet east of the end of that bridge to the point where you last saw Tom Holbrook, when going at the rate of thirty-five miles an hour; do you know?

A. It would take a few seconds.

Q. It would take but a few seconds. Just give me your opinion how few seconds you think it would take when going at thirty-five miles an hour—well, I will change that question: How far do you think it was from where you were standing by that brace to the east end of that bridge?

A. About one hundred and twenty feet.

Q. How long do you think it would take No. 15, when going at the rate of thirty-five miles an hour, to run from ninety to one hundred and fifty feet?

A. To run nine hundred feet?

Q. No, sir, to run from ninety to one hundred and fifty feet?

Defendant's Objection.—Counsel for defendant object to the question because the witness is not expected to know mathematically correct about these things. When he shows the distances and the time it takes it is easy enough for anybody to calculate it.

150 By the COURT: He may say if he knows.

A. About two seconds.

Q. I believe you said a little while ago that when you saw Tom Holbrook walking along that guard rail he was enveloped in smoke at that time. The whole bridge at that time was enveloped in smoke, was it not, covered up with smoke?

A. By the time he left me and I cleared up?

Q. Yes, by the time Tom Holbrook left you and went on the north side of the track and walked west. That was after you cleared up?

A. Yes, sir; and the bridge was covered with smoke slightly.

Q. How much was it covered with smoke at that time?

A. Not a great deal.

Q. Not a great deal?

A. No, sir.

Q. Thin smoke was it

A. Yes, sir, you could see a man about one hundred feet or more.

Q. You could see a man one hundred feet, or more?

A. Yes, sir.

Q. How many warnings did you hear in the nature of the cry "Railroad," or any other character that would give a warning?

A. Do you mean that day, or that time?

Q. I am asking about that day, and that time and place.

A. Oh, they were warned every time a train passed.

Q. I am asking now about the train that killed Tom Holbrook. Was there anybody else that hollered "Railroad" but once? Was there any cry of railroad out once?

A. That is all I heard.

Q. You heard one cry?

A. I heard Mr. Carbaugh, and Mr. Holbrook told me himself that he said to clear up.

Q. That was when 92 came. I am not speaking about that. Did you hear anybody holler "Railroad" now after Carbaugh had come out and said "There is 92," or after he saw 92, and Carbaugh said clear up for 92? After that, did you hear anybody else holler "Railroad" for No. 15?

A. No, sir.

Q. You heard nobody?

A. No, sir.

Q. Then if anybody at the east end of the bridge, or near the east end of the bridge hollered "Railroad" for No. 15 you never heard it?

A. I never heard it.

Q. Did you hear anything else to indicate that No. 15 was coming?

A. I heard a blast of the whistle.

Q. Where was No. 15 when you heard that blast?

A. It was something like 200 or may be 300 feet east of the bridge.

Q. Was it that far east of the bridge?

A. Yes, sir.

Q. Did you see it? As a matter of fact, wasn't 15 within one hundred feet of the bridge, or within less than one hundred feet of the bridge when it blew?

A. Smoke was getting dim then, and I couldn't tell you exactly at that time how close he was to the bridge.

Q. You mean that the smoke was getting thick, don't you?

A. Yes, sir.

Q. And you couldn't tell positively how close he was to the bridge?

A. No, sir.

Q. How long have you been working for the railroad company?

A. I have been working for this man going on seven years.

Q. For this man Anderson?

A. Yes, sir.

Q. How long did you work for any other men, or, how long have you been working for railroads is what I am talking about.

— I have been in the service of the railroad ever since 1904.

Q. As a bridgeman?

A. Yes, sir, and on track together.

Q. You are familiar with locomotive whistles, aren't you?

A. Yes, sir.

Q. You know what a crossing signal is?

A. Yes, sir.

Q. And what a station signal is?

A. Yes, sir.

Q. And you know their various locomotive signals, what they are?

A. Yes, sir.

Q. Did you ever hear of such a thing as a bridge signal. Is there such a thing known on the rule book as a bridge signal? In other words, do they blow for bridges?

A. On some occasions they do.

Q. Well, that is on some odd occasion and with some odd engineer, but I am asking you is there such a signal as a bridge signal? Do engineers blow for every bridge they get to?

A. No, sir, not as I know of.

Q. You know that they do not, don't you?

A. (A pause without response.)

Q. Between Welch and Davy how many bridges are there? Can you count them?

A. There are thirteen, if I ain't mistaken.

Q. What is the distance, five miles, isn't it?

A. I don't know exactly what is the distance.

Q. That is about it, isn't it?

A. More or less.

Q. A passenger train does not blow for all those thirteen bridges, does it? If so, they would be blowing all the way from Welch to Davy, wouldn't they?

A. Yes, sir.

Q. There is no such thing as a bridge whistle?

A. Not that I know of.

Q. That train was not blowing for the bridge, but blowing for the tunnel, wasn't it?

A. I suppose so.

152 Q. Were you able to see No. 15 at the time you heard that whistle?

A. No, sir.

Q. You heard the whistle, but you were unable to see the engine?

A. I heard the whistle, but didn't see it.

Q. You didn't know how close to the bridge it was?

A. No, sir, not positively.

Q. On account of the smoke?

A. Yes, sir.

Q. You think from the time you heard that whistle to the time when it got to you at that brace, it was how many seconds—as much as two?

A. Right near it.

Q. Mighty near it?

A. Yes, right near it.

Q. Right near two seconds from the time you heard the whistle to the time when it passed you where you were on the bridge?

A. Yes, sir.

Q. How far was Tom Holbrook west of you on that bridge at that time: do you know?

A. To where we found him——

Q. (Interposing.) I am not talking about where he was found.

A. I didn't see him at that second.

Q. You could not see him on account of the smoke?

A. No, in other words, I had my back to him.

Q. You had your back to him and were looking east and not looking at him at all?

A. No, sir.

Q. At the time you lost sight of him, or, I mean at the time you last saw him, when he was walking west on the guard rail, how far was he from you, before the smoke covered him up?

A. About three feet.

Q. How far would that train have knocked him if it had hit him, probably?

A. I couldn't say about that, because he struck a girder.

Q. It would be just a matter of conjecture. It might knock him a long ways and might knock him a short ways?

A. Yes, sir, I couldn't say how far.

Q. Where his body was found would be no indication of where he was when he was hit, would it?

A. No, sir.

Q. Would it be any indication of it at all?

A. Yes, sir.

Q. How do you work that out?

A. Because he would be on an angle before he struck the girder him being standing on this old guard rail, it would cause him to—

Q. (Interposing.) You assume then that he had never moved off of that guard rail and stepped in the middle of the track at all, although you didn't see him?

A. That is where the other men saw him last.

Q. In the middle of the track?

A. On this guard rail.

Q. And you assume that he never got in the middle of the track at all?

A. No, sir, I don't have the least idea he did.

153 Q. And that he was struck at an angle when he struck that bridge, and that was pretty near where you last saw him?

A. Yes, sir. As a matter of fact, none of us didn't know where he was when he was struck.

Q. You think it was about two seconds from the whistle of that train to the time when it passed you?

A. Something near it.

Q. And at that time Tom Holbrook was covered up, enveloped with a dense smoke, and if you had looked you could not have seen it?

A. No, sir, I don't have the least idea I would have been able to have seen him if I had looked.

Q. Mr. Walters, did you hear Mr. Carbaugh give any special instructions that morning to the men of that gang?

A. Yes, sir.

Q. Where?

A. Just when he went to loading the ties? When we went to the bridge to put the guard rails on.

Q. What were those instructions?

A. He said to be careful and to be on the watchout all the time, because this was a tolerably dangerous place.

Q. He said this was a dangerous place?

A. Yes, sir.

Q. Did he say why it was a dangerous place?

A. Because there was a curve on the east end and a tunnel on the west end, I suppose. I suppose that is what he had reference to.

Q. That made it a dangerous place?

A. Which I knew it was.

Q. With the tunnel on the west end of that bridge and the curve close to the east end of that bridge, you had a dangerous place, and Mr. Carbaugh knew it and said so?

A. He said it was a dangerous place, and for us to use all caution and clear up for trains.

Q. Did he say anything at that time about that being a particularly dangerous place because of the tunnel on the west end and the curve on the east end? Was there anything else to make it more dangerous than other bridges, anything other than those things?

A. No, sir.

Q. That curve on the east end was right close to the east end of the bridge, wasn't it, and there was a cut there also?

A. Yes, sir.

Q. Which obstructed the view from the east end of the bridge, didn't it?

A. For some distance.

Q. You may cross examine.

#### 154 Cross-examination.

By Mr. McCORMICK:

Q. You say that when first section of No. 15 came along that morning it carried plain signals; what were those signals?

A. Green.

Q. What did that mean?

A. It meant there would be another train of the same class as this one to follow.

Q. Was there any particular time for that train to pass, that second section?

A. No, sir.

Q. No particular time at all?

A. No, sir.

Q. It might come at any time at all?

A. Yes, sir.

Q. You had to be on the lookout for it all the time?

A. All the time.

Q. Mr. Werth asked you, and you didn't finish your answer to his question, as to what warning Mr. Carbaugh gave that morning to his men when they got upon the bridge, and after they finished loading ties. What was that warning?

A. He said to the men: "This is a tolerably dangerous place." He said: "Be careful; lookout, and in case of trains clear both of these tracks."

Q. When 92 came through it was after you had finished your dinner?

A. Yes, sir.

Q. What warning, if any, did he give then?

A. He says, "Clear up," and that means to get off of both tracks.

Q. Well, does clear up mean that the men must get off themselves, or clear off all timbers from the track?

A. Both.

Q. As a matter of fact, did you clear up?

A. Yes, sir.

Q. Mr. Holbrook came to where you were working when 92 was coming out of the tunnel, if I understand you, and assisted you in removing the piece of timber on which you were working?

A. He came from the east end of this guard rail where we had done cleared at that time and moved this block where we were framing on, himself.

Q. And then you went where?

A. I stepped to the north side of the bridge, on this floor beam.

Q. And you staid there until No. 15 came, did you?

A. Yes, sir.

Q. Was there plenty of time for everybody, before No. 15 came, to have cleared off the track?

A. Yes, sir.

Q. You got off yourself?

A. Yes, sir.

Q. Was there any reason why anybody else could not get off?

A. No, sir, there was plenty of places for them.

Q. When everybody had gotten off, and the track was all cleared, was there anything there for anybody to go back on for?

A. No, sir.

155 Q. I understand you to say that the time between the clearing up of the track, and the talk that you had with Mr. Holbrook, when he told you, "Dan said to clear up," before the arrival of No. 15, gave an abundance of time for everybody to have gotten clear of that track and clear of danger?

A. Yes, sir, there was.

Q. Mr. Carbaugh was not working at all that day, was he?

A. No, sir.

Q. He was keeping a lookout for these trains, wasn't he?

A. In both directions.

Q. In both directions?

A. Yes, sir.

Q. And he was warning the men working on that bridge?

A. That is right.

Q. That is all.

#### Re-examination.

#### By Mr. WERTH:

Q. Counsel for defendant company has asked you if there was an abundance of time between the time when Mr. Carbaugh hollered "Clear up" for No. 92, and the time when second 15 passed, and you said there was?

A. Yes, sir, there was.

Q. I understood you, on your examination in chief, that you

heard no man holler "Railroad" for second 15, and that there was only two seconds between second 15's whistle and the time when it passed you. Was that ample time for the men to get off who were a few feet west of you on the west bound track?

A. This man could have gotten in the clear at the same time that I did.

Q. Is that your answer?

A. Yes, sir.

Q. I understood you to say just now that Mr. Carbaugh was there to watch for trains in both directions; is that true?

A. Yes, sir.

Q. How long—well, Mr. Carbaugh at that time was at the east end of the bridge?

A. Yes, sir, or something near it.

Q. Mr. Holbrook knew it, didn't he?

A. Yes, sir.

Q. Mr. Holbrook knew that he was there, as you say, to watch for No. 15 coming from the east?

A. Yes, sir.

Q. Mr. Holbrook knew that, didn't he?

A. Yes, sir.

Q. I understand you to say that although you were nearer to Mr. Carbaugh than Mr. Holbrook was, that you did not hear Mr. Carbaugh holler "Railroad" for No. 15?

A. I never.

Q. You never heard Mr. Harrison holler "Railroad" for No. 15?

A. I never.

156 Q. You never heard any warning that No. 15 was coming on the west bound track, coming west, until No. 15 blew, did you.

A. That is all.

Q. And that was only two seconds before No. 15's pilot passed you? Is that it?

A. That is right.

Q. I want to ask you if between the time when No. 15 blew its whistle on the west bound track, going west, and that time Mr. Holbrook would have had ample time to have cleared the track before it came?

A. He was told to get in the clear. He told me to get in the clear, himself?

Q. Is that your answer?

Mr. McCORMICK: Let him finish his answer; I do not think he has finished.

Mr. WERTH: Go ahead.

A. And I was in the clear at the time, and why Mr. Holbrook didn't get in the clear, I don't know.

Q. Now, I didn't ask you why he didn't get in the clear. I will ask the stenographer to read the question that I did ask you again. (Which is done.)

A. (A pause without response.)



By the COURT: Mr. Werth has not asked you about the time he had after Mr. Holbrook said clear up for 92, but the time he had when you say you heard No. 15 whistle. Is that right, Mr. Werth?

Mr. WERTH: Yes, sir, that is right.

By the COURT: After you heard No. 15 whistle, did Mr. Holbrook have ample time to get in the clear?

WITNESS: He could if he had acted on the signal.

Q. Do you mean if he had acted on the instant?

A. Yes, sir, of the blast of the whistle.

Q. And if he was at a place then where he could have instantly gotten in the clear; that is what you mean, is it?

A. Yes, sir.

Q. Assume him to have been at a place that was enveloped in smoke, and not at a place where he could have instantly stepped into the clear, would he have had time to have gotten in the clear after No. 15 blew its whistle?

A. Yes, sir, he could have gotten in the clear if he had been in a place where he could have stepped into the clear.

157 Q. You do not seem to have understood my last question.

I have asked you to assume that he was in the smoke, and not at a place where he could have stepped immediately into the clear, would he then have had time to have walked to a place of clearance and gotten in the clear after No. 15 blew the whistle?

A. If he had been at this floor beam, he could have stepped in the clear.

Q. I did not ask you that. You do not know that he was at a floor beam, do you?

A. No, sir, I don't know.

Q. I am asking you to assume that——

The COURT: I suggest, Mr. Werth, that you use the word "suppose" instead of the word "assume."

Mr. WERTH: All right, your honor.

Q. I am asking you to suppose he was not at a floor beam, but between two floor beams and enveloped in smoke, and that Mr. Holbrook heard No. 15 blow its whistle at the same time you heard it, would he then have had time to have gotten in the clear before No. 15 got to him, in the two seconds you have mentioned?

A. I will have to answer that no.

Q. That is all.

Recross-examination.

By Mr. McCORMICK:

Q. You don't know where Mr. Holbrook was at the time you heard the whistle of second 15 blow, in reference to the floor beam, do you?

A. I do not.

Q. You didn't know whether he was between the two floor beams at all, or not?

A. I couldn't say.

Q. The last that you saw of him, he was walking, if I understood it, on the old guard rail?

A. Yes, sir.

Q. Now, on which side of the track was he then?

A. On the north side.

Q. On the north side of the track?

A. Yes, sir.

Q. Was it more than a step from there to clearance, for him to get in the clear, from where you last saw him?

A. One could step in, yes, sir; one good step will clear you.

Q. That is all.

Mr. WERTH:

Q. You have already stated in response to my re-direct examination that both you and Holbrook knew that Carbaugh had  
158 gone to the east end of the bridge to act, as you stated, as watchman. You meant as watchman for second 15, didn't you?

A. Yes, sir.

Q. You and Holbrook both had the right to suppose that Carbaugh would give some sign when second 15 came?

Defendant's Objection.—Counsel for defendant object to the question because argumentative.

Counsel for plaintiff says the witness may stand aside.

(Witness leaves the stand.)

D. M. CABLE, for Plaintiff.

Direct examination.

By Mr. WERTH:

Q. Where do you live, Mr. Cable?

A. I live at Pounding Mill.

Q. Tazewell county?

A. Tazewell county, Va.

Q. For whom do you work?

A. I work for L. W. Ringstaff, Walker Ringstaff.

Q. You work for whom?

A. For Walker Ringstaff, for L. W. Ringstaff.

Q. You mean that he is your foreman?

A. Yes, sir.

Q. What company do you work for?

A. The Norfolk & Western.

Q. In what capacity; what sort of work do you do?

A. Carpenter work.

Q. What on?

A. Bridges.

Q. How long have you been working at that sort of work?

A. Well, about six years, I reckon.

Q. What position do you hold in that sort of work; what rating have you got?

A. I have got next to the top rating; I am what is called a second rating.

Q. Next to the top rating, you say?

A. Yes, sir.

Q. Do you know Tom Holbrook?

A. No, sir, I don't.

Q. How many ratings are there for Bridge Carpenters?

A. I think about four now.

Q. First, second, third and fourth class carpenters, are they?

A. First, second, third and fourth, yes, sir.

Q. Are you familiar with the rules of the company?

A. Well, very well, I reckon.

159 Q. During those six or seven years that you have worked for the company doing bridge work, what part of its system did you work on?

A. Mostly on bridges.

Q. I mean, what division did you work on?

A. The Pocahontas division.

Q. On what part of the Pocahontas division have you worked on?

A. Pretty well over all of it.

Q. In Virginia and West Virginia?

A. Yes, sir.

Q. Have you worked much or little over that part of the division from Bluefield to Williamson?

A. Very much; the most of my work has been there.

Q. Are you familiar with the general custom and usage of the Norfolk & Western foremen with reference to sending out flags to protect men while they are working on bridges?

A. Well, I think I am, yes, sir.

Defendant's Objection.—Counsel for defendant objects to this line of examination and say that the custom and usage of foremen on other divisions has nothing to do with the question being inquired into here at all; that the question here is whether defendant used reasonable care to warn this man. If there was any duty resting upon the defendant to give any warning at all.

Objection overruled.

Defendant excepts.

Q. Are you familiar with bridge 899-A, at or near Pando, W. Va.?

A. Yes, sir, I think I have worked on the bridge.

Q. Do you know the situation there as to the approaches to that bridge at each end, east and west ends?

A. Yes, sir, I think I know about how the approach is built and all about it.

Q. I will ask you to suppose that a crew of six men with a foreman went to put down three or four or five guard rails on the bridge on the west bound track; and I will also ask you to suppose that while they are at work there, regular No. 15 goes west and carries signals indicating that it will be followed by a second section; to suppose

that the foreman in charge of that crowd has no time on the second section; to suppose that in framing the guard rails to put down on that bridge they are framed in the middle of the bridge, and that two blocks are put across the west bound track, and on those two blocks the guard rail intended to be framed is placed; and  
 160 that in that situation the guard rail is framed with two or three men working on it; in a situation of that kind, and I ask you to confine your answer to the usual custom and rule observed by Norfolk & Western foremen, ought there to have been a flag out east of that bridge, or not?

Defendant's Objection.—Counsel for defendant object to the question for the reasons stated in the objection to the last question, and also because it has not been shown that the witness is sufficiently qualified to answer the question of the character propounded, and because assuming facts that have not been established.

By the COURT: The objection is sustained. Mr. Werth, I think you must first ask the witness what is the custom of other Norfolk & Western foremen, and then develop what are the situations, if there be such, when they put out flags. I do not think this witness expert enough to give his opinion and answer a question which the jury has to answer.

Q. You have stated that you are familiar with the custom of foremen doing bridge work. I will ask you to say what is that custom in reference to protecting men while working on bridges?

Defendant's Objection.—Counsel for defendant object to the question.

Objection overruled.

Defendant excepts.

A. Well, sir, if a bridge is obstructed, why, they are supposed to have a flag.

Q. What do you mean by the use of the word "obstructed," in the answer you have just given?

A. Well, if the tracks are obstructed in any way for the passage of trains, why, they are supposed to have a flag out.

By the COURT: Mr. Werth has asked you the question, what do you mean by "supposed to have a flag out," or, I will suggest that Mr. Werth ask the witness what he means.

Q. What do you mean by saying they are supposed to have a flag out?

A. I mean to say that they ought to send a flag out if the track is obstructed.

161 Q. Where would they send that flag out and how far?

A. They want to send him out far enough to protect the obstruction, or protect the bridge, or the men working there.

Q. In sending a man out with a flag, how would that operate as a protection? Explain that to the jury.

A. How is that?

Q. How would the sending of a man out with a flag be a protection? What would the man with the flag do?

A. He is supposed to have written instructions, and to flag by the instructions. If the instruction says flag all trains, why he must flag all trains.

The COURT: I think I will strike out from the answer of the witness that part in which he said that they ought to have a flag out. I intended by my ruling permitting him to answer the question, that he should tell us what they did, and not give his opinion as to what they ought to do.

Q. I will ask you to say what foremen usually do when the track on the bridge is obstructed? I mean by that, what is customarily done? I don't want you to tell the jury what you think they ought to do, but want you to tell the jury if you know what they customarily and generally, in fact, do?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Well, they send out a flag where it is obstructed.

Q. I will ask you to suppose that a crew of men was putting down guard rails on that bridge at Pando; that in order to put those guard rails down, they put two blocks across the west bound track, and upon those two blocks laid the guard rail, and then two or three men went to work to frame those guard rails; would that be an obstruction as you understand the word among railroad foremen to mean?

A. Well, sir, if it could not be cleared up, I would call it an obstruction.

Q. I will ask you the question, are you familiar with the rules of the Norfolk & Western Railway?

A. Well, I think I am familiar with some of the rules. Of course, I don't know all of the rules and regulations.

Q. I read to you rule 616 on page 80 of the defendant  
162 company's book of rules, filed by it in this case, which rule, among other things, provides:

"Any work that interferes with the safe passage of trains at full speed is an obstruction, and must not be attempted without full protection in both directions."

I will ask you to explain to the jury what the words, "Without full protection in both directions" means as used in that rule?

Defendant's Objection.—Counsel for defendant object to the question, because it is for the court to construe that rule, and not for the witness; and furthermore, because the rule is not applicable to this case.

Counsel for plaintiff responds and says that he understands the court is supposed to be learned in the law, but not in the nomenclature of railroad work or mine work; and that in such matters rules referring to that work must be explained by witnesses familiar therewith.

By the COURT: Let me see that book.

(The Court examined rule book.) In view of the explanation which the rule itself gives of the meaning of those words, I will sustain the objection.

Counsel for plaintiff says that he will withdraw the question, or rather, will not insist on it for the present, and will offer the rules later.

Q. Where is the usual and customary place to frame guard rails, on the bridge or off the bridge?

A. Well, if they have a place off the bridge, they are supposed to be framed off the bridge. That is, I mean, if they have a place that they can frame them.

Q. I will ask you to tell the jury whether or not the ground is clear and open at each end of bridge 899-A near Pando?

A. Well, as far as I remember it is clear, yes, sir.

Q. Is there anything in the situation of the approaches to that bridge that would prevent the framing of guard rails on the ground at the ends of the bridge and off the bridge?

A. None that I remember.

Q. Knowing the bridge at Pando, and the approaches there,

I will ask you, where would have been the usual place  
163 to frame guard rails to be used on that bridge, according to  
the custom and usage of bridge foremen, that is, whether on  
the bridge, or off the bridge?

Defendant's Objection.—Counsel for defendant object to the question; (1) because custom and usage is not properly admissible in evidence; and (2) because the witness is not competent to give an opinion of what is the proper place according to the custom, and (3) because it is not made any issue by the declaration.

Counsel for plaintiff says that so far as the third objection is concerned, it is possible that it is not covered in the declaration.

Objection sustained.

Q. How fast do passenger trains, and especially No. 15, generally run between Welch and Williamson, going west?

Defendant's Objection.—Counsel for defendant object to the question, because irrelevant and immaterial.

The COURT: With the idea of having the jury know the situation; how much or how little danger there was with reference to train No. 15, that is, as to whether it was a very slow train or a fast train, or how it was usually run, I will permit the witness to answer the question.

Defendant excepts.

A. Well, the schedule is forty miles and hour, I think.

Q. Suppose a man to be somewhat west of the middle of that bridge, walking between the rails, or on the guard rail, and suppose that No. 15 was to blow the whistle when it was very near the east end of the bridge, and while it was going at its usual rate of speed; suppose there to be a double header freight train on the east bound track, going up grade, and that when the freight train had

pulled out a quantity of smoke from the tunnel, something that it usually pulls out of the tunnel, that smoke had settled over the bridge so densely that the men on the bridge could not see the tunnel, tell the jury whether or not the man on the track could have cleared in time to have saved himself after No. 15 whistled.

Defendant's Objection.—Counsel for defendant objects to the question as improper.

164 The COURT: I will sustain the objection, because I think that is a matter for the jury.

Q. I want you to suppose that the men were putting guard rails down on bridge 899-A at Pando, and to have framed the guard rails in the middle of the bridge, as I have indicated, and that a freight train came out of the tunnel, the smoke from which enveloped the bridge, as I have indicated, and that first or regular No. 15 had carried signals announcing a second section to follow, and which had not yet passed; and bearing in mind the curve east of the bridge, and the distance from the east end of the bridge to a point beyond which a train could not be seen, I will ask you to tell the jury how the men in that situation would have been protected according to the general usage and custom of bridge foremen on the Norfolk & Western Railway?

Defendant's Objection.—Counsel for defendant object to the question, because improper and a matter for the jury; and say that the witness may set forth the conditions and the means of escape, whether a man could clear, or not, but that the witness may not give an opinion as to how he could clear according to the usage and custom of the work.

Counsel for plaintiff says that a party seeking to establish negligence is entitled to show that what was done was contrary to the usage and custom of men doing like work under like circumstances, and quotes the case of Southern Railway v. Blanford.

The COURT: The question should state all of the facts, and I think the question propounded does not comprise all of the facts.

Counsel for plaintiff says that he will not insist upon an answer to the question at this time, but reserves the right to examine this witness further tomorrow if he should then see fit so to do, and says that he does not feel physically able to continue the examination this evening.

Cross-examination.

By Mr. McCORMICK:

Q. Mr. Cable, I understood you to say that if the track of a bridge was obstructed then according to the usage and custom of the work, it was to send out a flag?

A. Yes, sir.

165 Q. But if it was not obstructed, and the track was clear, then that you did not send out a flag?

A. Certainly not.

Q. Now, there is no necessity for sending out a flag, and there



is no rule requiring a flag to be sent out at all unless there is some obstruction there; that is true, is it not?

A. Yes, sir.

Q. If, as a matter of fact, this bridge had been cleared of timber and cleared of men, or, is as a matter of fact, the men had had time to clear themselves of danger, then there was no necessity for sending out a flag?

A. No, sir, no flag.

Q. If it could not be cleared up, you said you would call it an obstruction?

A. Yes, sir.

Q. But if it could be cleared up, you would not call it an obstruction; that is true, isn't it?

A. Yes, sir.

Q. Stand aside.

Re-examination.

By Mr. WERTH:

Q. I will ask you if such obstructions as I have mentioned could be cleared up if no warning of No. 15 was given until train No. 15 came around the curve and blew the whistle at a point, say, within one hundred or one hundred and fifty feet of the east end of the bridge?

Defendant's Objection.—Counsel for defendant object to the question, because a matter of opinion for the jury.

Objection sustained.

(Witness leaves the stand.)

*Plaintiff Offers Rules in Evidence.*

Counsel for plaintiff offers in evidence the following rules found in the Book of Rules of the Norfolk & Western Railway Company furnished by defendant in this case on summons of plaintiff:

Rule No. 602

Rule No. 606

Rule No. 613

Rule No. 616

Rule No. 617

166 And also under the heading "Audible Signals," paragraphs 14 and 15.

Also special rules entitled "Rules for the Government of Employees Working on or about Tracks," issued September 1st, 1910, by the second vice president and general manager, to-wit, special rules six, seven, eight and twelve.

The said rules are in the words and figures following, to-wit:

Norfolk & Western Railway Company Rules and Regulations for  
the Government of the Operating Department—Audible Signals.

\* \* \* A succession of short sounds of the whistle is an alarm for persons and cattle on the track, and calls the attention of trainmen to danger ahead.

(15) The explosion of one torpedo is a signal to stop; the explosion of two not more than 200 feet apart is a signal to reduce speed, and look out for a stop signal.

Master Carpenters.

\* \* \* 602. They must distribute time-tables to foremen employed under them and obtain their receipt therefor."

Road Masters.

\* \* \* 606. They must know that the persons under their charge understand and obey the rules, and understand the use and meaning of signals, and instruct foremen of extra gangs to give flagging instructions in writing; see that materials are safely kept and economically used; attend in person to the removal of slides, snow or other obstructions; in case of accident, take the necessary force to the place and use every effort to clear the road; have the standard time and compare with each foreman once a week or oftener, and know that watches are inspected every three months. Give attention to the water supply and report any defect or deficiency; keep an oversight of work performed by contractors and mechanics and see that they do not endanger the safe passage of trains, and make careful inquiry and report fully in writing respecting any accident or case of personal injury to passengers, employees or others on their sub-divisions.

\* \* \* 613. They must compare time each day with the clock at the nearest telegraph office, or with the conductor of a train; and must carefully observe signals displayed by trains.

\* \* \* 616. Any work that interferes with the safe passage of trains at full speed is an obstruction and must not be attempted without full protection in both directions. If merely a reduction in speed is necessary, they must have caution (green) signals placed at a sufficient distance from the obstruction and must have proceed (white) signals placed just beyond the obstruction on the engine-man's side of the track. Where it is necessary for trains to come to a stop before reaching the obstruction, or where the caution signals can not be seen, from the obstruction, they must send out flagmen with stop (red) signals a proper distance to insure full protection. They must report all failures of enginemen to properly acknowledge these signals.

617. They must not permit their switch keys to pass out of their possession, and must personally attend and supervise the opening and closing of switches.

They must protect themselves in both directions on double track, expecting at all times to have trains run in the reverse direction.

Form C. T. 308.

Norfolk & Western Railway Co. Rules for the Government of Employees Working on or About the Tracks.

\* \* \* (6) Foremen or others in charge of employees working on or about the tracks must instruct their men to be alert, watchful, and to keep out of danger; and will take all reasonable precautions to see that all men working under their immediate supervision receive warnings of approaching trains in time to reach a place of safety.

(7) When working on tracks in places where approaching trains can not readily be seen because of permanent obstructions to the view, or temporary obstructions, such for instance as fog, storms, snow or engines or cars, extra precautions must be taken to warn the men of approaching trains.

Foremen, watchmen, and others, in charge of gangs or squads of workmen, must provide themselves with a whistle, and should use the same in warning men when working in places where approaching trains can not be readily seen.

(8) As an extra precaution, when necessary to place a watchman at some distance from the men at work on the tracks, or in such location that his signals may not be understood, additional watchmen should be placed so that the signals can be passed to the men at work and return signals obtained. In case return signals are not received and understood, the watchman must signal the train to stop.

\* \* \* (12) In tunnels where clearance is limited and no man-holes or other places of safety provided, foremen must arrange with the Superintendent for the use of track and work under flag protection.

Defendant's Objection.—Counsel for defendant object to the introduction of the rules as offered by plaintiff.

*Ruling of Court.*

By the COURT: The objection of defendant to the reading at this present juncture, at any rate, of rules 602, 606, 613, 616, 617, and special rules 12 in the leaflet, is sustained; as is also the objection to paragraph 15 on page 16 of the rule book.

The objection to reading of paragraph 14, on pages 15 and 16 of the Rule Book, and the reading of the special rules 6, 7 and 8 of the leaflet is overruled.

Defendant's Exception.—Counsel for defendant except to the ruling of the court in permitting the introduction of special rules 6, 7 and 8, and paragraph 14, as not being applicable to this situation here being investigated.

Thereupon counsel for plaintiff read to the jury the said special

rules 6, 7 and 8, as found in the leaflet, and paragraph 14 found on pages 15 and 16 of the Book of Rules of the defendant company.

D. M. CABLE, for plaintiff, recalled for further direct examination.

By Mr. WERTH:

Q. I will ask you if you know that the Norfolk & Western Railway Company issued and its bridge foremen received, and if you received some time after May 30, 1912, and before January 4, 1913, any special instructions or bulletins in reference to flagging trains?

A. Yes, sir, they received instructions to flag all trains.

169 Q. What was the nature of the instructions? Were they in writing?

A. Well, I suppose there was a bulletin put out to that effect.

Q. Did you see the bulletin?

A. I heard it read—yes, sir, I saw it in his office car.

Defendant's Objection.—Counsel for defendant object to the questions and answers and say if the rule is in writing it should be produced as the best evidence and an opportunity given to counsel for defendant to see the paper and know whether or not it is relevant.

Counsel for plaintiff avows that the paper is not in the plaintiff's possession and she has no knowledge of where it is; that the same is true of counsel for plaintiff, and that at the time the call was made for the other papers, counsel for plaintiff did not know that there was such a paper in existence; however, counsel for plaintiff now calls upon counsel for defendant to produce the paper by tomorrow morning.

Counsel for defendant reply that they should have had notice before now that counsel for plaintiff desired the production of the paper, and ask counsel for plaintiff if he did not know of its existence before this trial began.

Counsel for plaintiff replies and says that he thinks he did hear of it first as he came on to this trial and he will not insist upon an answer by the witness at this time, but will reserve the right to recall the witness later on.

The COURT: I will sustain the objection, because I do not think counsel for plaintiff can wait until he comes into the actual trial of the case before making a call, when he has known of its existence some days before the trial began. I think that would come under the head of unreasonable delay.

(Witness leaves the stand.)

#### *Plaintiff Offers Letters of Instructions.*

Plaintiff offers in evidence a letter dated April 20, 1907, issued by J. R. Anderson, Master Carpenter, addressed to "To All Carpenter Foremen," and which was produced by defendant on the summons of the plaintiff, and which letter is copied within a letter from A. F. Bourne, addressed to J. R. Anderson, M. C., under date June 9, 1913.

170 Defendant's Objection.—Counsel for defendant object to the introduction of said paper for the following reasons:

(1) That it does not show on its face to have been issued in the course of business of the defendant company, or for what purpose A. F. Bourne was sending to J. R. Anderson a copy of a circular dated April 20, 1907, and, so far as the letters shows on its face, it may have been merely a matter of private correspondence between A. F. Bourne and J. R. Anderson;

(2) That as to the circular mentioned in the letter and set out by them, dated Bluefield, W. Va., April 20, 1907, as shown on its face, it was issued a number of years before this accident happened, and under circumstances different from the circumstances surrounding the business of the defendant company at the time of the happening of the accident, and it is not shown that it was in effect at the time of the happening of the accident; and,

(3) The circular itself shows that it was for the protection of trains and not for the protection of men working on bridges.

### *Court's Ruling.*

By the COURT: The objection is sustained for the reason that this circular relates to circumstances different from those in the case at bar. This relates to cases where in order to do other repairs to a bridge it became necessary to remove the guard rail during the greater part of the day; or, for at least several hours, during which time there would be no guard rail at all; and does not relate to a situation where a new guard rail would immediately replace an old one.

Plaintiff excepts.

And the said letter is in the words and figures following, to-wit:

171

Form G 9-Thin.

Subject: Renewing guard rail on bridges.

Norfolk & Western Railway Co.

FLAT TOP, VA., June 9, 1913.

Mr. J. R. Anderson, M. C., Bluefield, W. Va.

DEAR SIR: Confirming phone conversation with your office this P. M. rel. to circular letter on the above subject.

Beg to advise that I have found this letter in my file, and it reads as follows:

"BLUEFIELD, W. VA., April 20th, 1907 r.

To All Carpenter Foremen:

Our attention has been called to the fact that the schedule speed was allowed to be made over bridges where guard rail was being renewed. When you are working on bridges on the main line or at any point on the Division, or at any of the Branch Lines where passenger trains are used, the wooden guard rail must not be taken

up without placing a slow order over the bridge or protecting the bridge by the use of flags and instruct all trains not to exceed a speed of 4 miles per hour over the bridge while the guard rail is up.

In case you are doing some small job on a bridge and it is necessary to take up the guard rail through the day and place it back at night you may work under flags, flagging the trains as above directed, but if it is necessary to leave the guard rail off of the bridge over night in all places a slow order must be placed over the bridge as there is danger of the ties bunching in case of a derailment and the train go through the bridge. I wish to impress upon you the necessity of the above being carefully lived up to.

After the schedule changes and there are more passenger trains put on between Bluefield and Williamson, at that time we will not flag passenger trains while removing wooden guards from bridges, but will place slow order over same. Please acknowledge receipt of this letter and advise if understood.

Yours very truly,

J. R. ANDERSON, M. C."

172 The original copy of the above circular, I have pasted in a book. Please advise me if you want same, and if so, I will forward it to you.

Yours truly,

A. F. BOURNE."

(At 6:10 P. M. the court adjourned until tomorrow morning until 9:30.)

TUESDAY, June Twenty-fourth, 1913.

(Morning Session.)

Court re-convened at 9:30 A. M. pursuant to adjournment on yesterday.

The plaintiff continued to introduce here evidence in chief as follows:

D. M. CABLE, for plaintiff, recalled for further examination by Mr. Werth.

Q. Mr. Cable, suppose the track to be constructed in the following manner in the operation of putting down a new guard rail: Suppose there were two pieces of timber, 6 x 7 x 5 feet long across the track, and that on top of those two pieces of timber, there is another piece, a new guard rail, six by seven, twenty feet long, weighing about two hundred pounds; suppose in addition to that the usual tools that they used in framing guard rails are on the bridge, and not exceeding three men doing that work of framing, about how long, in your opinion, judging from experience with such work, would it take to clear that bridge?

Defendant's Objection.—Counsel for defendant object to the question upon the ground that the jury is just as capable of forming

an opinion as to how long it would take to clear the bridge, and the fact that other people did clear the bridge, as the witness is to give an opinion on it. The Supreme Court has decided that opinion evidence on this matter is not admissible and is a question for the jury to pass upon.

Counsel for plaintiff says that the only questions which should go to a jury to pass upon are those which men of common  
173 knowledge are supposed to have, and that the jury has no common knowledge as to how long it takes to perform that operation by bridge men; that the jury might form an idea as to how long it would take them to do it, but not as to how long it would take bridge men to do it.

Objection overruled.

Defendant excepts.

A. It would be cleared very quick by clearing out on the ends of the ties.

Q. Just what space of time do you mean by "very quick?"

A. Well, probably it might take five minutes.

Q. I will ask you to fix the point on the track east of bridge 899-A near Pando at which a train going west on the west bound track could be first seen by a man standing or near the east end of the bridge as it came around the curve assuming a freight train to be going east on the eastbound track, and then tell the jury how long it would take No. 15, a passenger train, to run from that point to the bridge if it was running at the usual rate that No. 15 runs at that point?

A. You want me to state the distance?

Q. No, I want you to tell how long it would take No. 15 to run from the point at which you could first see it if you were standing on the east end of that bridge to the bridge, how long it would take No. 15 to make that distance if going at the usual rate of speed?

A. I could not tell exactly.

Q. I understand, but give me your opinion?

A. It wouldn't take but a very few seconds I don't suppose, may be a couple of seconds.

Q. I believe you said that they were allowed to run that train at the maximum rate of forty miles an hour?

A. Yes, sir, but I haven't got that exactly located, that cut, how close that cut is located to that bridge.

Q. That is all.

Cross-examination.

By Mr. SMITH:

Q. Mr. Cable, suppose there were two pieces of timber laying across the track about sixteen or eighteen feet apart, and a new guard rail was laying up on those two pieces of timber when the order was given to clear up, what would be the situation  
174 there; there would only be three pieces of timber to be removed, wouldn't there?

A. Yes, sir.



Q. How many men would it take to remove the guard rail?

A. Two men, over on the ends of the ties, they have done it.

Q. One at each end?

A. Yes, sir.

Q. Then when they removed that over on to the ends of the ties what else had to be done about the moving of the timber? That left only two pieces there to be removed?

A. Two pieces to be removed.

Q. Could not one man remove each one of those?

A. Well, I couldn't say—I don't expect he could.

Q. A piece five feet long, six by seven inches, made of white pine?

A. Well, it would take him longer to move it than it would two men, of course.

Q. Could not one man move it?

A. One man could move it, but he could not move both pieces at once, I don't think.

Q. Could not one man move each piece?

A. How is that?

Q. Could not two, one each who had been at the end of the guard rail, could not one man take hold of each end of the guard rail and lay it off?

A. A man at each end of the guard rail can lay it off easily.

Q. And the man at the east end of the guard rail could remove one of those pieces?

A. Yes, sir.

Q. And the man at the west end could lay the other off?

A. Yes, sir.

Q. Suppose in addition they had to remove an adz and a square, do you think it would take five minutes to perform that operation?

A. Well, sir, it might take that. I don't say exactly it would take five minutes.

Q. Don't you think it could be done in one minute or half a minute?

A. I don't say exactly. It would be a short time, but I don't say accurately.

Q. Now, if there were three men there to remove that stuff instead of two, it could be removed more quickly?

A. It looks so, sir.

Q. What is that?

A. It looks that way.

Q. Couldn't it be done quicker by three men than by two?

A. Three men, of course, could move it quicker than two, could get hold of the timber.

Q. Could not three men move that stuff in half a minute, if necessary?

A. Well, I never timed myself in regard to such as that. I could not say for certain exactly.

175 Q. Don't you think they could do it in one minute?

A. I couldn't say.

Q. Then you have a very vague opinion of how long it would take?

A. How is that?

Q. You have a very vague opinion as to how long it would take them to do that?

A. I said it could be done very quickly in my first statement.

Q. That is all.

### Re-examination.

By Mr. WERTH:

Q. Mr. Cable, suppose the men to be doing it in their usual manner and way, and there to be open spaces between the ties, and between the tracks on the bridge, tell the jury, in your opinion, if they could clear the track of the timbers and themselves in two seconds, or three seconds, or four seconds?

Defendant's Objection.—Counsel for defendant object to the question, because not properly re-examination and leading.

Objection overruled.

Defendant excepts.

A. Well, sir, as I stated at first, it could be done very quickly, but I couldn't tell exactly the number of seconds it would take to do it. As I said, I never timed myself in regard to that work.

Q. Do I understand you to mean by that answer that you regard it as a doubtful or a close question whether they could do it in the time No. 15 could run the distance that you have indicated?

Defendant's Objection.—Counsel for defendant object to the question, because leading and further because not properly re-examination.

The COURT: The witness mentioned on his direct examination that it might take five minutes, and on cross examination counsel for defendant sought to lay some doubt on that, and therefore I think it is proper that he should be re-examined on the matter.

Defendant excepts.

176 A. Well, what I said in regard to the distance of the cut makes it so I couldn't tell exactly about that. I told you in the start that I couldn't know exactly how the cut was located, the exact distance.

Q. But I have understood you to say that 15 would consume only about two seconds running that distance. Now, my question is, do I understand you to mean to say that it is doubtful in your mind whether the clearing up of the timbers and the men on the bridge could be done in an equally short time? What is your opinion about which would take the more time?

Defendant objects.

Objection overruled.

Defendant excepts.

A. I should think it might take five minutes to clear the timber up.

Q. That is all.

(Witness leaves the stand.)

L. H. GREGORY, for plaintiff.

Direct examination.

By Mr. WERTH:

Q. Mr. Gregory, for what company do work?

A. The N. & W.

Q. How long have you worked for them?

A. I reckon about twenty-one years.

Mr. McCORMICK: For how long?

WITNESS: For about twenty-one years. I think I commenced, if I remember aright, the fall of 1891.

Q. During that time, what kind of work have you done for it?

A. Well, track work and bridge work.

Q. What positions have you worked in during that time; I mean by that, what grade man are you, fourth-class, third-class, 177 second-class or first-class?

A. Well I worked on section as a hand, and as foreman, and then I went to work on bridge force, and worked in tunnels, timbering tunnels, and helped arch some, and worked on bridges, and buildings, and done all that.

Q. In working on bridges, what positions have you held; as a hand, as a bridge carpenter, assistant foreman, foreman, or what?

A. Well, I have worked at all those positions.

Q. You have worked at all those positions?

A. Yes, sir, I worked as assistant foreman, and when the foreman was gone I acted as foreman.

Q. Are you familiar with the general custom and usage of bridge foreman in doing such work on bridges, with reference to protecting the men?

A. Well, yes, sir, I reckon so.

Q. Are you familiar with the rules of the company, and I mean by that the printed rules of the company?

A. Well, tolerably. I have not got a very good recollection. I have read them a good deal.

Q. They have rules, I presume, that apply to men in your position?

A. Yes, sir.

Q. Are you familiar with bridge 899-A at or near Pando, W. Va., between Welch and Davy?

A. No, sir.

Q. You don't know that bridge?

A. I don't remember of ever walking across that bridge but once. I think I have crossed it, but am not positive about crossing it since it was done. I think I have once, but I ain't certain about that. That has been several years ago.

Q. That bridge is situated with reference to its approaches as follows: It is double tracked, both tracks being main tracks over which through trains run east and west; there is a tunnel within forty feet of the west end of the bridge, and there is a curve just

about 250 feet, or thereabouts, east of the east end of the bridge; over those two tracks many trains run east and west daily, all east bound trains coming out of that tunnel pull smoke out and it settles over that bridge; and a bridge crew consisting of six men and its foreman went there on January 4, 1913, to take out some old guard rails and put in new guard rails; in order to do that work they brought in new guard rails to about the middle of the bridge and there they laid them on two pieces of timber across the west bound track, sixteen, seventeen or eighteen feet apart; upon those two pieces of timber they laid the new guard rail, each of those pieces of timber being six by seven, and the two that were laid across the track being about five feet long and the new guard rail about twenty feet long, and they framed the guard rails in the middle of

178 the bridge and between the rails of the west bound track, laying the guard rails on the two pieces across the track; in the morning before this work was begun regular 15, being a through passenger train, from Bluefield to Columbus, Ohio, passed, and was seen by the foreman carrying signals indicating a second section to follow at some time during the day, but the foreman had no time on the second section, and did not know when it was going to come, but it had not yet passed when the work was begun and carried on; I will ask you to tell the jury, if you know, how those men doing that work on the bridge would have been generally, customarily, and usually protected from trains to be expected to pass over the west bound track? I now hand you for your information of the situation a lot of photographs taken of the bridge and the approaches thereto which you will please examine before answering the question.

Defendant's Objection.—Counsel for defendant object to the question upon the ground that the form thereof is improper and because it assumes things not established in this case, and because the whole question calls for vague, indefinite and uncertain opinions, and that, too, when the witness has said that he has only passed over the bridge once, is unfamiliar with it, and the conditions there, and, furthermore, because the question is calling for an opinion of the witness and the jury is just as capable of expressing as is the witness.

Objection sustained.

Plaintiff excepts.

Q. Mr. Gregory, I ask you to tell the jury how men working on a bridge are customarily, usually, and generally protected when they are working in a situation that would endanger them from passing trains?

A. Well, there are different ways; flagging.

Q. That is all?

A. When taking up track, and obstructing the track, they are generally flagging, have flags out. The foreman on the bridge, or some one that is looking out for the men, not all the time, but there are flags out. There is a heap of bridge work that is done without any flags.

Q. Does the question as to whether or not the foreman usually and generally puts out a flag depend upon the situation at the bridge; that is to say, whether they have an unobstructed view of approaching trains in each direction, or whether the view  
179 is obstructed so that they can not see approaching trains from one or other direction in time to clear the track?

A. Well, now, that would depend on the work that is being done. If you are putting in ties and then want to go to framing guard rails and putting down ties where bunched up, you would have flags out, but to put on a few pieces of guard rail—I don't know anything about this place where it is at, but it is very often the case that there is no flag out. It has been the case with me, and I have worked with several foremen, in several gangs, when they were just putting on a piece or two of guard rail, and it is not all the time that there is a flag out.

Q. I understand you from the answer to mean to say, that sometimes a flag would be out, and sometimes a flag would not be put out, depending upon the circumstances of the case?

A. Well, and the work you are doing.

Q. And the work you are doing?

A. I do not know what work they were doing at this place, or anything about it, but in putting in ties, the track is obstructed. But for putting on guard rails, when the track is spiked up—it is usually spiked and made safe before we put on the new guard rail, for the passage of trains, and if flags are out, as was our usual way of doing in the gang I worked with when putting in ties, and you got done putting in ties, and the ties spiked up, you generally left the flag out until dinner or until night before calling it in, and put on the guard rail. And then after dinner, if the work is in safe condition, to use the flagman on the bridge.

Q. Use the flagman on the bridge?

A. Yes, sir, to assist in putting on the guard rail.

Q. Suppose the flagman is on the bridge, he could not see farther than 250 feet from the end of that bridge on account of the curve, where then would you station that flagman?

A. Well, in sending a flag out, I send him back the proper distance.

Q. What would be the proper distance?

A. Well, it is owing to the lay of the land, or the curves and straight lines. Fifteen telegraph poles used to be considered safe, and from that to three-quarters of a mile and a mile. When sending a flag out, we always sent them out, without it is merely to get the trains to slow up, and sometimes something will turn up and we will tell a flagman to get his flag and run up the road and may be wave it in before he gets out of sight, but when you station a flag out, you want to go back a safe distance to protect you.

180 Defendant's Motion to Strike Out.—Counsel for defendant move the court to strike out the question and answer as irrelevant to the issues in this case, and say that same has nothing to do with the matters being investigated here, and that because of the fact of something being done on some other section of the railroad

is no reason why it should be done on this section, and that if the defendant railway company in this particular instance used reasonable or ordinary care to protect its men that is all that is necessary.

Counsel for plaintiff states that in view of the objection by counsel for defendant he wishes to ask another question and get an answer thereto before the court rules on the objection.

Q. The answers you have given, as I understand, are based upon what is usually, customarily and generally done by bridge foremen on the Norfolk & Western Railway, and are not merely your own private opinions?

A. Well, I don't know that is more my opinion than others. I have worked with a heap of other foreman and have been throwed out with work by myself. That is generally the rule of doing the work. I am speaking of what I have been engaged in myself.

Q. That is all.

Defendant's Objection.—Counsel for defendant renew their objection and motion to strike out the question and answer, for the reasons heretofore stated.

Objection sustained.

Plaintiff excepts.

Counsel for defendant now ask the court to instruct the jury to disregard this evidence.

By the COURT: Gentlemen of the Jury, these questions and answers by the witness are stricken out and you will disregard them.

Q. I will ask you to suppose that men are on a bridge putting down a guard rail in such a situation that unless they have timely warning of the approach of trains they may be caught and struck by approaching trains; now, supposing this to be true, I will ask you what is usually, customarily and generally done for their protection while in that situation?

181 Defendant's Objection.—Counsel for defendant object to the question because of its general character, and say that the matter under inquiry here is, what did the railway company do, and whether it did it in the exercise of ordinary and reasonable care.

Objection overruled.

Defendant excepts.

A. To flag.

Q. You may cross-examine the witness.

A. If you take it in that way you put flags out, I think.

Cross-examination.

By Mr. McCORMICK:

Q. Suppose the track has been cleared of men and timber, there is then no necessity for a flag is there?

A. I think not; I don't think so.

Q. Well, you say you think not. As a matter of fact, it is true that there is no necessity, isn't it?

A. Nothing more than for the men to get off and out of the way. He will have to watch to get off.

Q. Now, assuming, or supposing that the men were not putting down guard rails, but were framing guard rails, or framing a guard rail to take the place of an old one, and that the foreman is there, and that the foreman warns them of the approach of trains, is there any necessity for a flag under those circumstances?

A. No, sir, I think not.

Q. Supposing now that the foreman is doing no work at all, but is keeping guard on this bridge for trains coming from the east or the west, or from any other direction, and he gives a warning of them, is there any necessity for a flag under those circumstances?

By the COURT: Mr. McCormick, you are propounding questions on the very line to which you objected when propounded by the plaintiff, and, on your objection I ruled them out. In other words, Mr. Werth asked questions from his view point and you objected, and on your objection I ruled them out. Now, you are seeking to ask questions from your view point, and I think I should also rule those questions out. I might suggest, however, in view  
182 of my ruling, that you might ask, if the men were not in a situation of danger, was there any necessity of putting a flag out.

Defendant excepts.

Q. If the men were not in a situation of danger or had timely warning to get off and get to a place of safety, was there any necessity for a flag?

A. No, sir, I should say no.

Q. Well, you know not, don't you?

A. Well, that is what I said, but I just didn't say I knowed it.

Q. You didn't know Mr. Holbrook, did you?

A. Yes, sir.

Q. Did you know Mr. Carbaugh, or, I mean, do you know him?

A. Yes, sir.

Q. How long have you known him?

A. All his life.

Q. He is a good man, isn't he?

Plaintiff's Objection.—Counsel for plaintiff objects to the question, and say it is improper, and that even a good man may be guilty of negligence just as well as a bad man, and that the matter is immaterial and irrelevant.

Counsel for defendant says that plaintiff in her declaration has charged Mr. Carbaugh with incompetency, and that he will change the question.

Q. Mr. Carbaugh is a competent workman, is he, or not?

Plaintiff's Objection.—Counsel for plaintiff object to the question as improper to prove the competency of a man upon the opinion of another man.

The COURT: I think perhaps the more correct idea would be to state his character with reference to his care, diligence and forethought.



Counsel for defendant withdraw the question until the plaintiff proves the allegation he has alleged in his declaration as to Carbaugh, until that time nothing being here to be rebutted.

Q. That is all

183 Re-examination.

By Mr. WERTH:

Q. You were asked if there would be any necessity for flagging if the foreman gave the men on the bridge ample warning.

By the COURT: Mr. Werth, that was ruled out and it is improper on re-examination.

Q. All right, stand aside.

(Witness leaves the stand.)

W. H. PERRY, for plaintiff.

Direct examination.

By Mr. WERTH:

Q. Mr. Perry, did you ever work for the Norfolk & Western Railway Company?

A. Yes, sir.

Q. What work did you do for that company?

A. Bridging.

Q. How long did you work for it?

A. I don't exactly remember, but for three or four years. I went to work in 1901, as well as I remember, and either quit the fall of 1904 or the spring of 1905.

Q. Did you work in the capacity of what is known as bridge carpenter?

A. Yes, sir.

Q. I will ask you to suppose that men are on a bridge putting down guard rails, in such a situation that unless they have timely warning of the approach of trains, they may be caught and struck by approaching trains; supposing this to be true, I will ask you what is usually, customarily and generally done for their protection while in that situation?

Defendant's Objection.—Counsel for defendant object to the question, because of its general character and say that the matter properly under investigation here is, what did the railway company do, and whether that was done in the exercise of ordinary and reasonable care.

Objection overruled.

Defendant excepts.

A. By having a flag out.

184 Q. Did you go to bridge 899-A some months ago at the instance of counsel for plaintiff for the purpose of inspecting the bridge and its approaches?

A. Yes, sir, I did.

Q. Who went with you?

A. Jehn Howery, I believe, and I don't know the other gentleman's name.

Q. Do you mean this gentleman over here?

A. Yes, sir.

Q. That is E. T. Stallard?

A. Yes, sir.

Q. Who else, if anybody?

A. Mr. Werth.

Q. Did you make some measurements there?

A. I did.

Q. Did you make measurements of the distance from the mouth of the tunnel to the west end of the bridge?

A. Yes, sir.

Q. Did you make a measurement of the distance from the east end of the bridge to a point on the west bound track beyond which a train going west on the west bound track could not be seen?

A. Yes, sir.

The COURT: Could not be seen by a man standing where?

Mr. WERTH: At the east end of the bridge.

Q. I hand you a paper purporting to be a rough sketch of the bridge in question and its approaches east and west, and ask you to tell the jury who that paper was prepared by, and if it fairly represents the bridge and its approaches east and west?

A. Yes, sir, that is about the way it is.

Q. The question I asked you was, to tell who the paper was drawn by?

A. By Mr. Werth.

Plaintiff's Exhibit No. 1.—And the said paper is introduced in evidence, and, for the purpose of identification, is marked, "Plaintiff's Exhibit No. 1."

Q. Did you make a memorandum on the ground of the distances I referred to in the preceding questions?

A. Yes, sir.

Q. I will ask you to tell what the distance is from the mouth of the tunnel to the west end of the bridge?

A. Forty-one feet by my measurement.

Q. How far is it from the east end of the bridge to a point on the west bound track east of the bridge beyond which a train could not be seen by a man standing on the east end of the bridge?

A. Two hundred and twenty feet.

Q. I will ask you to explain to the jury how that measurement was made, and as indicated on this diagram or sketch which has been introduced and filed, marked "Plaintiff's Exhibit No. 1"?

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A. Where I got the measurements, do you want?

Q. No, sir, how you got the distance from here to there?

A. There was a train that pulled across that bridge at the time

I made this measurement and that gave me the point, by watching the train going east I could——

The COURT: Do you mean a west bound train approaching the bridge while you were on the bridge?

WITNESS: No, sir, one going east.

Q. One going east on the east bound track?

A. Yes, sir.

Q. Explain to the jury how you arrived at the point by the aid of that train on the east bound track, going east?

A. By stepping over and sighting from a joint on the rail, I believe, where I made the measurement. This train was going east.

By the COURT: Did you notice the point where it disappeared from your sight?

WITNESS: Yes, sir.

Q. If I understand you correctly, when the train pulled out of the tunnel while we were there, on the east bound track, you and Mr. Howerly and others of the party immediately took up a position on the east of the bridge and marked the point on the west bound track at which that train cut off the view?

A. Yes, sir.

Q. And that distance is what?

A. Two hundred and twenty feet.

— Was the train going east on the east bound track on that occasion a passenger train or a freight train?

A. A freight train.

Q. What was about the overlap of the cars on that train beyond the ends of the ties, as near as you can tell? I mean by that, how far did the cars come out over the ends of the cross-ties in the track?

A. Well, I would say something like a couple of feet, I think. I don't know exactly.

Q. Were the spaces between the ties on that bridge open or closed?

A. Open.

Q. Was the space between the tracks open or closed?

A. Open.

Q. How far were the floor beams of that bridge apart?

A. About ten feet.

186 Q. What was about the length of the bridge?

A. About two hundred and twenty-five feet.

Q. Was the point on the bridge where the body of Tom Holbrook was picked up indicated by you on the bridge by anybody?

A. Yes, sir.

Q. Did you measure the distance from that point——

A. (Interposing.) I did.

Q. (Continuing:) To the end of the west end of the bridge?

A. Yes, sir.

Defendant's Objection.—Counsel for defendant object to the questions and answers with reference to a place being pointed out where Tom Holbrook was picked up until, and unless it is shown that the man, or men, who pointed out the place knew that it was the correct point.

Counsel for plaintiff says that he will prove that.

Q. Who were the men who indicated the point where the body was picked up that is, I mean, were they *they*, or not, employees of the Norfolk & Western Railway Company?

A. I didn't exactly understand your question.

Q. I will ask the stenographer to read the question. (Which is done.)

A. I think so.

Defendant's Objection.—Counsel for defendant object to the question and answer because it does not show who the men were and whether they were present, or not.

Counsel for plaintiff says they were the men who went there immediately afterwards, the section men, they said.

Counsel for defendant say that the railroad company is not bound by what they said.

The COURT: You can not go into this evidence without an avowal that you will prove the parties who pointed out the place had means of knowing that it was the exact spot.

Q. That is all, then.

Cross-examination.

By Mr. McCORMICK:

Q. When did you go there, Mr. Peery?

A. If I ain't mistaken, I went there on the twenty-third of May, as well as I remember.

187 Q. What year?

A. 1913.

Q. Do you mean this last May?

A. Yes, sir.

Q. Who went with you?

A. John Howery and Mr. Werth and this gentleman sitting over here.

Q. Was there anybody else there during that time except you and Mr. Werth and John Howery?

A. I think there was just some passers-by, but I don't know who they was.

Q. Oh, I mean anybody taking any part in those measurements?

A. No, sir.

Q. There was nobody else there except you all?

A. No, sir.

Q. That map, or diagram, you say, was made by Mr. Werth?

A. Yes, sir.

Q. You didn't have any part in the making of that diagram?

A. Not a bit in the drawing of it.

Q. You think it fairly represents the situation as you saw it on that day?

A. Yes, sir, I do.

Q. What the situation was there some months ago you did not know?

A. I did not understand the question.

Q. What the situation was there some months before you did not know?

A. No, sir.

Q. Well, now, you say that you have been in the service of the railway company, and I believe you said that you had been a bridge carpenter. How long were you in that service?

A. I think I went on the road——

The COURT: He has answered that question by saying he went to work in 1901 and quit either the fall of 1904 or spring of 1905.

Q. You quit the service of the railway in 1904 or 1905, did you?

A. Yes, sir.

Q. And have had no connection with it from that time down to the present?

A. No, sir.

Q. That is all.

Re-examination.

By Mr. WERTH:

Q. Did you see any indication there of the track having been recently moved, or of the bridge having been recently moved?

A. No, sir.

Q. Did you see any indications on the bridge of new guard rails having been put down?

A. Yes, sir, I saw some.

188 Q. What was the number of the bridge?

A. 899-A.

Q. That is all.

(Witness leaves the stand.)

JOHN HOWERY, for Plaintiff.

Direct examination.

By Mr. WERTH:

Q. Mr. Howery, did you ever work for the Norfolk & Western Railway Company?

A. Yes, sir.

Q. What sort of work did you do?

A. Bridge carpenter.

Q. How long did you work as bridge carpenter?

A. About two years.

Q. I will ask you to suppose that men are on a bridge putting down a guard rail in such a situation that unless they have timely warning of approaching trains, they may be caught and struck by approaching trains, and supposing this to be true, I will ask you what is usually, customarily and generally done for their protection while in that situation?

Defendant's Objection.—Counsel for defendant object to the question, because of the general character thereof and say that the matter being investigated here is what did the railway do, and whether or not it exercised ordinary and reasonable care.

Objection overruled.

Defendant excepts.

A. Well, I would think they are supposed to have a flag out there.

Q. Did you go to the bridge at or near Pando, W. Va., some time last May at the request of counsel for plaintiff in this case for the purpose of making some measurements?

A. Yes, sir.

Q. Who went with you on that occasion?

A. Harry Peery, and I don't know what the other fellow's name is over there.

Q. E. T. Stallard?

A. Yes, Stallard and you, I know.

Q. And Mr. Werth, do you mean?

A. Yes, sir.

189 Q. Did you make some measurements there?

A. Yes, sir.

Q. While we were there making measurements, did any train pass over that bridge, and, if so, in what direction, and what sort of train was it?

A. Well some several passed over there, and I believe they were freight trains, though.

Defendant's Objection.—Counsel for defendant object to the question because irrelevant unless it is shown that the situation there on the day they were present relates back to the situation when the accident occurred.

By the COURT: Well, subject to one point, which I do not think present here, I think the question admissible. It is all introduced on the supposition that there has been no change in the distance from the tunnel to the bridge and the distance from the bridge to the cut and the curve, or change as to the location of the bridge, and the main features of the bridge itself. The last witness said there was no indication of any changes in those respects.

Defendant excepts.

Q. I will ask you if a train came out of the tunnel and went east on the east bound track while we were there?

A. Yes, sir.

Q. Was any effort made by any party when that train pulled out of the tunnel to go to the east end of the bridge and ascertain how far a train on the west bound track could be seen while that east bound train was going east?

A. Yes, sir.

Q. Was that distance ascertained?

A. (A pause without response.)

Q. Did you find out that distance?

A. Yes, sir.

Q. I now hand you a diagram prepared by counsel for plaintiff in this case some time after the trip was made to West Virginia and ask you to examine that diagram and tell the jury whether or not it fairly represents the bridge in question and its approaches east and west. (Counsel handing witness the paper introduced in evidence and marked "Plaintiff's Exhibit No. 1.")

A. Yes, sir.

Q. I will ask you to tell the jury the distance at which a train going west on the west bound track could be seen when a train is going east on the east bound track, could be seen from the east end of the bridge, as demonstrated there that day?

A. Well, two hundred and twenty feet it measured.

190 Q. Who made that measurement?

A. Myself and that gentleman over there.

Q. And who else?

A. Harry Peery.

Q. What is the distance from the mouth of the tunnel to the west end of the bridge?

A. Forty-one feet.

Q. What is the number of that bridge?

A. 899-A.

Q. Did you notice any evidence there on that occasion of any changes recently having been made, either in the track or the bridge?

A. Well, I believe I noticed one new piece of guard rail that had been put down.

Q. Did you notice any changes, and I mean by that, any apparently recent changes, indicating that the track east of the bridge had been moved in any way?

A. No, sir.

Q. You may cross-examine.

Cross-examination.

By Mr. McCORMICK:

Q. Mr. Howery, when were you in the service of the railway company?

A. Well, I haven't been there since the first of this month, two years ago since I worked there.

Q. Under whom did you work while there?

A. C. W. Anderson.

Q. Why were you discharged?

A. I don't know about that. I laid off one day and he said something to me about it, and I just quit I reckon.

Q. Did you just quit, or were you discharged from the service?

A. I don't know; they said they were going to discharge me, or talked like they was.

Q. And instead of allowing them to discharge you, you laid off?

A. Yes, sir.

Q. And quit yourself?

A. Yes, sir.



Q. Was not the charge against you that you had been drunk that day?

A. Well, I believe it was.

Q. Well, now, you said just now, under the conditions which Mr. Werth put to you in his question, that it was ordinary and usual to send out a flag. I want you to tell the jury whether it is either necessary or ever done and that is, to send out a flag if the foreman is there watching out for trains and giving the men warning of the approach of them. Is there any use for a flag under those circumstances?

The COURT: Don't answer that question. That question is subject to the same objection raised by counsel for defendant to a question propounded by counsel for plaintiff a while ago, 191 and the ground of the objection was that he did not embody all of the facts, and I realize that it would take a very long question to embody all of the facts in this case.

Defendant excepts

The COURT: The Court, further advising counsel for defendant that they may, if they see fit so to do, ask the witness whether, or not, it was usual and customary to put out a flag if the men on the bridge were not in a situation of danger.

Q. Now, Mr. Howery if the men on the bridge were out in a situation of danger and the track had been cleared both of timber and of men was there any sort of necessity for putting out a flag?

Plaintiff's Objection.—Counsel for plaintiff objects to the question because improper.

By the COURT: The objection is sustained, because it is not the question that the court suggested might be asked the witness.

Defendant excepts.

Q. Is it ever usual or customary to put out a flag when the men are not in danger and there is the foreman on the track to warn them of the approach of danger?

Plaintiff's Objection.—Counsel for plaintiff objects to the question for the reason heretofore stated, and because it is not different from the question just propounded and ruled out by the court.

Objection sustained.

Defendant excepts.

Q. Is it ever usual or customary when the men are not in danger to put out a flag at all?

A. I guess not.

Q. Well don't you know it is not usual to do it?

A. I never read the rule book any and don't know much about them.

Q. You are not familiar with the rules of the company?

A. No, sir.

192 Q. You haven't been in the service of the company for some years, have you?

A. It has been a couple of years.

Q. And you are not familiar with them, but so far as you know,

when the men are not in danger it is not usual or customary to put out a flag at all.

A. I would think not.

Q. You say you were a member of Mr. Anderson's gang?

A. A member of it?

Q. Yes. You were working under Mr. Anderson, I mean by that?

A. Yes, sir.

Q. Was Mr. Carbaugh assistant foreman at that time?

A. Yes, sir.

Q. Stand aside.

Re-examination.

By Mr. WERTH:

Q. You were asked if you had not been discharged for drunkenness. I ask what was your condition as to being sober or drunk on the day you went down to make these measurements; were you sober that day?

A. Yes, sir, I was sober.

Q. That is all.

(Witness leaves the stand.)

C. W. ANDERSON, for Plaintiff.

Direct examination.

By Mr. WERTH:

Q. Are you the Mr. C. W. Anderson who was Mr. W. T. Holbrook's foreman?

A. Yes, sir.

Q. You are at this time also a foreman for the defendant company?

A. How is that?

Q. I will ask the stenographer to repeat the question. (Which is done.)

A. I am.

Q. Are you physically disabled in any way?

A. I think not, sir.

Q. Have you one leg or two legs?

A. I have one leg and wear an artificial leg.

Q. You are of opinion and so state to the jury that a man with an artificial leg and one leg that the Lord gave him is not physically disabled?

193 Defendant's Objection.—Counsel for defendant object to the question, and say it is improper that the fact should be proved and the jury may determine themselves the situation.

Counsel for plaintiff says he is asking the witness a question based upon the answer already given.

Objection overruled.

Defendant excepts.

A. I don't think he is, to perform the duties I am required to perform.

Q. Who is your assistant foreman?

A. Mr. D. G. Carbaugh.

Q. During the last several months, prior to January 4, 1913, who most frequently went out with your gang of men as foreman to perform the duties of foreman, you or Mr. Carbaugh?

Defendant's Objection.—Counsel for defendant object to the question and say it is immaterial who went out; that the fact to be inquired into is, who was in charge at the time.

Objection sustained.

Q. State to the jury whether or not Mr. Carbaugh frequently went out as foreman of your gang?

A. Mr. Carbaugh when present, always went out with the men. I ordinarily do, but not always. When present I always go out on the work, but do not always do so right at the same time that Mr. Carbaugh goes out. Mr. Carbaugh is often sent out with the men to do work, and I take a part of the men and he takes a part of them.

Q. If you will observe the question I last put to you, I asked you the question who went out as foreman, not seeking to have you compare the times that you went out as foreman with the times that Mr. Carbaugh went out as foreman, but simply ask you if Mr. Carbaugh frequently went out as foreman?

A. Never as foreman when I am there, except when I send him away to do work.

By the COURT: Mr. Anderson, you did not answer the question as to the frequency with which Mr. Carbaugh went out as foreman. Was he frequently sent out as foreman?

WITNESS: Oh, yes, sir, he was sent out as foreman.

194 Q. How long have you been working for the Norfolk & Western Railway Company?

A. As well as I remember, I commenced work for the Norfolk & Western Railroad Company—

Q. (Interposing.) Wait a moment. You will observe that the question I put to you was how long have you been working for the Norfolk & Western Railway Company. I have not asked you to give the jury a history of your service with the Norfolk & Western Railway Company. You can say how many years you have worked for them, and that is all I have asked you for.

Defendant's Objection.—Counsel for defendant object to the question, and say that when counsel for plaintiff has propounded to the witness a question, he should be permitted to answer the same without interruption.

Counsel for plaintiff replies that he has propounded to the witness a categorical question and wishes a direct answer thereto without the witness going into a history of his employment.

The COURT: I think Mr. Werth is right. He has a right to know how many years the witness has worked for the railway company

without the witness giving a history of his employment during those years.

Defendant excepts.

A. I have been working for the railroad company about twenty-six years.

Q. You are familiar with the rules of that company that may apply to bridge foremen, I suppose?

A. I think so.

Q. I will ask you if it is not true that bridge foremen are required to know the rules applicable to them and their work and what they are to do and not to do with regard to securing reasonable safety for the men under them?

A. I think so.

Q. I will ask you to tell the jury whose duty it was to inform and to see that assistant foremen had knowledge and notice of those rules?

A. It was my duty.

Q. I will ask you to tell the jury if at any time you ever gave Mr. Carbaugh notice of Rules six, seven and eight, embraced in the leaflet entitled "Rules for the Government of the Employees Working on or about the Tracks," issued September 1, 1910, which leaflet

I now hand you and ask you to examine.

A. I do not remember giving Mr. Carbaugh this particular pamphlet.

Q. Did you know Mr. W. T. Holbrook, who was killed January 4, 1913, while working for the defendant?

A. Very intimately.

Q. How long had you known him?

A. For perhaps seven years, but I am not sure of the time, but about seven years.

Q. What were the grades of bridge carpenter; are they graded?

A. They are.

Q. What are the grades?

A. Well, we have four different grades.

Q. What grade did Mr. Holbrook belong to?

A. Mr. Holbrook was a first grade man.

Q. You mean by that he was a first class man?

A. He was a first class man.

Q. From what grade are foremen promoted?

A. Well, ordinarily from first grade.

Q. Tell me something about Tom Holbrook's character, intelligence and habits, especially with reference to his being a first class bridge man?

A. Well, I considered Mr. Holbrook a first class bridge man. I considered him a careful man. He was a good bridge man, a good workman, an honest workman, and a moral, good man.

Q. What would you say with reference to his intelligence?

A. He was a man of fair intelligence.

Q. What would you say with reference to his habits, with reference to his being industrious, or otherwise, sober, or otherwise, and along that line generally?

A. He was a very industrious man, and a sober man so far as I know.

Q. What wages did he receive as a first class carpenter?

A. He received two dollars and seventy-five cents.

Q. Two dollars and seventy-five cents per day?

A. Yes, sir, per day.

Q. I believe you were not present on January 4, 1913, when Mr. Holbrook was killed?

A. No, I was not present.

Q. You have no personal knowledge of anything that occurred there?

A. No personal knowledge of the accident at all.

Q. That is all. You may cross-examine.

Cross-examination.

By Mr. McCORMICK:

Q. Mr. Anderson, although you have an artificial leg, does that incapacitate or disable you from doing work as foreman  
196 such as you are required to do by your employment?

A. It does not, sir.

Q. Do you go out frequently on the work yourself?

A. I do, sir.

Q. I understood you to say in reply to Mr. Werth that Mr. Carbaugh went with you and you divided the gang, you taking a part and he the other part. Did you keep up with the gang all day while they were working?

A. Yes, sir.

Q. Now, on this particular day, January 4, 1913, were you sick?

A. I was, at home.

Q. How long had you been sick?

A. I was sick about two weeks.

Q. That prevented your going out on the work that day?

A. Yes, sir.

Q. Otherwise you would have gone out upon it?

A. Yes, sir.

Q. I understood you to say that you had been in the service of the Railway Company about twenty-seven years?

A. About twenty-six years.

Q. How long have you been foreman?

Plaintiff's Objection.—Counsel for plaintiff objects to the question as immaterial if it is intended to be followed up by giving a history of his employment.

A. I had been foreman about twenty-two years at that time.

Q. In the service of the Norfolk & Western Railway Co.?

A. Yes, in the service of the Norfolk & Western Railway Company.

Plaintiff's Objection.—Counsel for plaintiff says it is entirely proper to cross-examine this witness along the line of his direct examination, and along the line that plaintiff's attorney used Mr.

Peery and Mr. Gregory, but that he objects to their using him at this time along the lines that plaintiff's attorney used Mr. Peery and Mr. Gregory because his direct examination was not made to include such things, and such cross-examination would not be responsive to the examination in chief. Counsel for plaintiff says if that is the intention of counsel for defendant at this time that he objects, and insists that the competency of this witness, which he does not deny, for a moment, is not involved.

Counsel for defendant says that plaintiff charged in her declaration the incompetency and negligence of this foreman.

197 Counsel for plaintiff replies that his declaration charged Mr. Carbaugh.

By the COURT: Ordinarily I follow the rule that counsel may develop any point in a case when the witness is on the stand, and knows the facts about which he is being interrogated. It facilitates matters, and gets through very much sooner, and does no real harm ordinarily.

Q. Now, Mr. Anderson, you say you do not recall to have given to Mr. Carbaugh this leaflet from which Mr. Werth read, or called your attention to rules six, seven and eight. You do not remember whether you did it, or not. Look at that pamphlet, please.

A. I do not remember giving him this pamphlet.

Q. Was that pamphlet in your office and did he have access to it?

A. I do not remember.

Q. You do not remember?

A. I do not remember.

Q. Do you remember whether, or not, there was a summary of that pamphlet made up and posted in your office?

A. Yes, sir.

Q. What do you call your office?

A. I have one half of a car.

Q. Where is that car located with respect to the bridge?

A. With respect to the bridge?

Q. Yes, sir.

A. Well, it is usually on a side track, as near as we can get to the bridge.

Q. It is right at the bridge, isn't it?

A. Yes, sir.

Q. Do the men have access to that office of yours?

A. They have.

Q. Do they pass through it and out of it daily, or not?

A. Often, yes, sir.

Q. Do you remember whether, or not, Mr. Holbrook, himself, passed in and out of this daily when at work?

A. Mr. Holbrook at one time occupied one end of the car that I staid in, and was very intimate with me, and often came into my room and sat down and talked and looked at my papers.

Plaintiff's Objection.—Counsel for plaintiff objects to this examination and says that rules six, seven and eight, as introduced by plaintiff, do not apply to Mr. Holbrook, and that the rules were

introduced exclusively with reference to foremen, and therefore it is utterly immaterial whether Mr. Holbrook knew about them, or not.

198 Q. I asked you a little while ago if you had a sort of summary of this leaflet, which is——

Plaintiff's Objection.—Counsel for plaintiff objects to the question, and says that the rule announced by the Court does not permit leading questions, and that counsel for defendant seems to be leading this witness in developing their side of this case.

By the COURT: You are examining this witness now, Mr. McCormick, on your own case, and you can not ask leading questions. Mr. McCormick: I will change the form of the question.

Q. I will ask you to look at the paper I now hand you, headed, "Form C. T. 307, Norfolk & Western Railway Company, Notice, Rules for the Government of Employees Working on or about the Tracks," and say whether or not that was placed up in your office, and, if so, who placed it up.

Plaintiff's Objection.—Counsel for plaintiff objects to the question, and to the form referred to as irrelevant and immaterial.

By the COURT: I think the defendant entitled to introduce this and to ask how much of its contents were known to the men.

Counsel for plaintiff asks if counsel for defendant are seeking to introduce it as notice to Carbaugh or to Holbrook.

Counsel for defendant reply that they are introducing it as notice to Carbaugh and Holbrook both, and that they are going to show that both saw it and read it.

Counsel for plaintiff says it is absolutely inadmissible and that there is not a word in it that applies to this case; that the declaration charges neglect on the part of the foreman to perform the duties which the foremen owed to the men, and that there is not a syllable in that card that contains a word as to the duty of the foreman to his men; that rules six, seven and eight of that leaflet are not referred to in that card, and counsel for plaintiff insists that

199 counsel for defendant have not the right to show whether Carbaugh, did, or did not, see that card. Furthermore counsel for plaintiff insists that the card does not apply to the said Holbrook, because there is a presumption of law that Holbrook had the right to rely on Carbaugh knowing his duties and that he would perform them, and the proof here is of a neglect by Carbaugh to perform his duties.

Counsel for defendant say that this notice, at the very outset, says that it applies to every employee working on or about the tracks of the railway company.

Counsel for plaintiff says that that calls his attention to another objection to the card: The court will find by examination of that card that it refers to what the company's duty is under certain circumstances, and that is a mere declaration of legal duties, intended to be used in just such a situation as is now at the bar, and is improper.

Objection overruled.

Plaintiff excepts.



A. It was placed in my office, tacked up on the wall. I placed it up.

Q. By your office, what do you mean? Is that your car?

A. That is a car or a room, in which I stay.

Q. Is that the same car in which Mr. Holbrook occupied one half of it at one time?

A. Yes, sir.

Q. Now, I will ask you to read to the jury just what that paper says.

Plaintiff's Objection.—Counsel for plaintiff objects to the question.

Objection overruled.

Plaintiff excepts.

“Form C. T. 307.”

“Norfolk & Western Railway Company.

Notice,

*Rules for the Government of Employees Working on or About the Tracks.*

It is the duty of every employee working on or about the tracks of this company to exercise great care to avoid injury to himself and others, and nothing in these rules is to be so construed as to relieve any employee from performing his full duty in that respect.

Employees must examine and know for themselves that tools, material, etc., which they must make use of in performing their duties are in proper condition. If not, they must put them so, or report them to the proper person and have them put in proper order before using.

On the approach of a train employees who are working on or about the tracks must move to a place of safety. They must not walk or stand on the track except when necessary for the proper performance of their duty.

Watchmen, patrolmen, track walkers and others, on *duties* which makes it necessary for them to be on the track, whether there are two or more tracks, should, when practicable, travel against the current of traffic, keeping a sharp lookout in both directions for approaching trains.

Any employee, who, while on duty, is careless about the safety of himself or others, or he disregards warnings, will be disciplined.

Employees working in a tunnel or near the end of same, when a train approaches from either direction, must stand clear of all tracks, and, if in the tunnel, must occupy the manhole.

While in tunnels employees are required to have an adequate number of lights.

Trains will be run in either direction on any track, whenever necessary or expedient, and workmen will be governed accordingly.

Employees whose duties require them to work on or about the track must supply themselves with a copy of these rules.

N. D. MAHER,

*2nd Vice President & Gen. Mgr.*

Issued September 1, 1910."

Q. Mr. Anderson, you have said that this was pasted up in your car. Tell the jury where it was put?

A. Posted up right against the wall, right opposite where I ordinarily stay.

Q. Will you say whether or not it was so posted that everybody who came in and went out of the car could see and read it?

A. It was.

201 Q. Do you remember ever to have seen Mr. Holbrook see and read it?

A. I can not say that I ever saw him see or read it.

Defendant's Exhibit A.—The card which has just been read to the jury is introduced in evidence, and, for the purpose of identification, is marked, "Defendant's Exhibit A."

Plaintiff's Admission.—Counsel for plaintiff admits that the decedent, W. T. Holbrook, had knowledge and notice of the contents of the leaflet from which rules six, seven and eight have been read to the jury.

Mr. McCORMICK: I do not understand from that that you admit that Mr. Holbrook had notice of this card?

Mr. WERTH: I simply made that admission, because a copy of the leaflet was found among Mr. Holbrook's effects.

Mr. McCORMICK: But you do not admit that he saw this notice which has just been introduced in evidence?

Mr. WERTH: I have no knowledge on that subject.

Q. Do you know whether it was the habit or custom of Mr. Holbrook, or what was his habit, or custom, with respect to reading all notices that were posted up in your car?

A. Mr. Holbrook very often came into my car and read my bulletins that I had hung up in my car, and things of that kind about the car.

Q. Is this notice what you would call a bulletin?

A. Well, it is practically the same thing.

Q. You do not remember to have seen him specifically read that?

A. I do not remember that I ever saw him read that. I have seen a number of the men do so, but am not sure that I ever saw Mr. Holbrook read it.

Q. It was very conspicuously put up, was it, or not?

A. Yes, sir, it was. It was placed there because that was the place where all of the men had an opportunity to see it.

Q. And to read it?

A. Yes, sir.

Q. Was it in the form which is shown to you now?

A. Exactly.

Q. In large letters so that everybody could read it?

A. To the best of my knowledge that is the exact form.

Q. Was that before the accident?

A. Yes, sir.

202 Q. How long had that notice been up in this car before this accident?

A. It had been there for quite a while, since shortly after it was sent out.

Q. It is dated September 1st, 1910, I believe, isn't it?

A. 1910. Well, it undoubtedly has been up that long, or nearly that long, at least.

Q. Was it in your car at the time of the accident?

A. It was.

Q. And had it been there from the time it had been issued, up to the time of the accident?

A. From the time I received it it was there. And it is there yet, or was the last time I was in the car.

Q. How long after the date of it, did you receive it?

A. Well, I don't know exactly.

Q. About?

A. Certainly shortly after the date of it, because it has been there quite a long time.

Q. How many days, or weeks?

P-aintiff's Admission.—Counsel for plaintiff admits that that notice which has been introduced in evidence over plaintiff's objection was received and posted in witness' car prior to this accident. This admission is made to save time and because counsel for plaintiff thinks that the witness is now being examined on an immaterial matter.

Q. You said you were familiar with the rules regulating bridge foremen?

A. I did.

Q. Now, did you instruct Mr. Carbaugh as to those rules, or did he have access to them?

A. He had access to them.

Q. Do you know whether he read them, or not?

A. He has often borrowed my text book, or book of rules to read.

Q. Is there any reason why he could not have read them just as well as you?

A. None that I know of.

Counsel for plaintiff objects to the question and answer as irrelevant and incompetent, because it was the duty of Carbaugh, as foreman, to have those rules and to be familiar with them.

Q. It was the duty of Carbaugh to come and get the rules and read them, and I assume that he did that, is that a fact?

A. That is a fact.

Q. Mr. Werth makes the point that it was your duty to instruct your assistants with reference to the rules. Did you in-  
203 struct him as to the rules?

A. I often talked them over with him, often.

Q. And instructed him as to their meaning, what the rules were?

A. Often.

Q. You did that with Mr. Carbaugh?

A. Yes, sir, with Mr. Carbaugh often.

Q. Besides that you say that Mr. Carbaugh got the rules, and you saw them read over frequently?

A. Yes, sir, a number of times.

Q. This notice provides that "Employees working in a tunnel or near the end of same, when a train approaches from either direction, must stand clear of all tracks, and if in the tunnel must occupy the manholes." Now, assuming, or supposing, that these men were working about the middle of the bridge, how far would they be from the mouth of the tunnel?

A. I would say about two hundred feet, as a guess.

Q. What was the purpose of putting that notice up in your car?

A. That the men might see it. This was a general rule applying to all hands, to the men as well as the foremen, that they might have an opportunity to read it.

Q. And might know what they must do to protect themselves?

A. Yes, sir.

Q. That is all for the present.

Re-examination.

By Mr. WERTH:

Q. I will ask the stenographer to repeat to this witness the question which was first propounded to witness Gregory and afterwards read to several other witnesses.

(Which is done, as follows:)

"I will ask you to suppose that men are on a bridge, putting down a guard rail, in such a situation that unless they have timely warning of approaching trains, they may be caught and struck by approaching trains, and supposing this to be true, I will ask you what is usually, customarily and generally done for their protection while in that situation."

Defendant's Objection.—Counsel for defendant renew their objection heretofore made, that the question is of too general a character, and that the matter being investigated here is, what did the railway company do, and whether that was in the exercise of ordinary and reasonable care.

204 Counsel for defendant make the further objection in this instance that this is not proper on re-examination.

The Court: It is not proper unless Mr. Werth will say he overlooked the matter in chief.

Counsel for plaintiff says that he can not say he overlooked the matter and that he thought the question would be propounded by counsel for defendant.

Objection sustained.

Counsel for plaintiff says that under the circumstances he will not except.

Q. What wages do you get, Mr. Anderson?

Defendant's Objection.—Counsel for defendant object to the question as totally irrelevant and immaterial.

Objection overruled.

Defendant excepts.

A. What do I get?

Q. Yes, sir.

Defendant objects.

Objection overruled.

Defendant excepts.

A. \$3.60 per day.

Q. You have stated in response to counsel for defendant that Carbaugh frequently borrowed your book of rules. I presume you refer to the book of rules issued by Mr. Needles, General Superintendent, and in effect on and after December 1st, 1905? That is true, isn't it?

A. I am not sure that this is a copy, and that mine was not an older one than that. I am not sure about that.

Q. At all events you had reference to the current book of general rules the company issued to all the foremen; is that a fact?

A. That is what I mean to say, yes, sir.

Q. You did not have reference to rules six, seven and eight, as set out in the leaflet to which I referred and which you examined on your examination in chief, and which you said you have no recollection that Mr. Carbaugh had ever seen?

A. I can not say positively that Mr. Carbaugh read those particular—

The COURT: That is not the point. Counsel for plaintiff asked you the question, if when you said Carbaugh borrowed your rules you had reference to the book of rules or the rules contained in the little leaflet?

A. I had reference to the regular book of rules.

Q. I hand you the leaflet which you examined on your examination in chief, and will ask you to tell the jury if either one or any part of rules six, seven and eight set out on page three is embraced in the card which you say was posted in your office in the camp car?

Defendant's Objection.—Counsel for defendant object to the question as wholly irrelevant.

By the COURT: They speak for themselves and it is a matter to be determined by the jury whether this card embraces those rules, or not. I will sustain the objection.

Q. As I understand you, you have stated that so far as you know Mr. Carbaugh never saw rules six, seven or eight on page three of the leaflet referred to; is that correct?

A. I don't know whether he did, or not.

Q. That is all.

## Recross-examination.

By Mr. McCORMICK:

Q. There is a question I forgot to ask you. You said *the* Mr. Holbrook was getting \$2.75 a day, I believe?

A. Yes, sir.

Q. Do you mean by that a working day?

A. Yes, sir, of ten hours.

Q. Well, now, when he didn't work he didn't get \$2.75?

A. No, sir.

Q. Were there many days when he did not work?

A. Yes, sir, often, on account of bad weather.

Q. If it was raining and the weather was bad, did they work, or not?

A. No, sir, not always. Sometimes we had to do it.

206 Q. You meant that he got \$2.75 a day when he actually made a day of ten hours?

A. Yes, sir, a day of ten hours.

Q. Suppose he made only five hours a day, then what?

A. He just got half price.

Q. What did you say?

A. He would only get five hours pay, or half a day.

Q. And if the weather conditions were such as to prevent working, he got nothing, and did not work at all?

A. No, sir.

Q. That is all.

## Re-re-examination.

By Mr. WERTH:

Q. During the time immediately following the recent floods in Ohio the men worked daily over ten hours a day, didn't they, and got extra pay, didn't they?

A. Yes, sir.

Q. Some of them made as high as a hundred and over one hundred dollars a month, didn't they?

A. They did.

Q. And that is true of every time a wreck occurs, and they are often called out to work on Sundays, and in rainy weather, are they not?

A. Yes, sir.

Q. Then they often did extra work and when they did extra work they got extra pay?

A. They did.

Q. Where do the bridge men board?

A. They board in camp, in the regular boarding cars.

Q. In the camp car?

A. Yes, sir.

Q. A sort of mess?

A. Yes, sir, run about as a mess.

Q. The board costs them very little, I presume?

A. Well, I don't know what you mean by the words "very little."

Q. Well, I mean to say eight to fifteen cents a day?

A. It runs up from anywhere from ten to fifteen cents a day—no, more than that. It costs from ten to fifteen cents a meal.

Q. Isn't it a fact that their board costs them only about ten or fifteen cents per day?

A. No, sir.

Q. You think it costs them ten to fifteen cents a meal?

A. Yes, sir, a meal.

Q. Which would be thirty to forty-five cents per day?

A. Yes, sir.

Q. Was Mr. Holbrook an extravagant or economical man?

A. He was.

Q. Which?

A. What was the question?

Q. I asked you whether he was an extravagant or an economical man?

A. He was an economical man, according to my observation.

Q. Do you happen to know that he had accumulated considerable and invested it in real estate in Bluefield?

Defendant's Objection.—Counsel for defendant object to the question as irrelevant and say that counsel may only show the earning capacity of the man.

Objection overruled.

Defendant excepts.

A. I don't know anything about his private affairs or business, except that he has told me that he owned a house and lot in Bluefield.

Defendant's Objection.—Counsel for defendant object to the answer, and move to strike same out as hearsay.

Counsel for plaintiff says he will not resist the motion and will prove it in another way.

By the COURT: The answer is stricken out and the jury will disregard same.

Q. You have stated that frequently that bridge men would lose time on account of rains, and that they would frequently make extra time on account of wrecks, floods, etc. I want you to tell the jury as near as you can if you know about how much a first class bridge man of Mr. Holbrook's industrious habits could earn per month on an average, taken all the year around, counting extra work that he might be engaged in.

A. All the year around I would say he would earn between sixty-five and seventy dollars per month.

Q. That is all.

(Witness leaves the stand.)



Direct examination.

By Mr. WERTH:

Q. Are you related to the plaintiff in this case, Mrs. Sarah E. Holbrook?

A. Yes, sir, I am.

Q. What is your relationship?

A. I am her nephew.

Q. Were you related to Tom Holbrook?

A. Yes, sir, I was.

Q. What was your relationship to him?

A. First cousin.

Q. Did you go to bridge 899-A on the occasion referred to by some of the witnesses in this case for the purpose of making some measurements there?

A. Yes, sir, I did.

Q. While you were there did a train come out of the tunnel on the east bound track, going east, and pass over that bridge, and go on?

A. Yes, sir.

Q. What was the character of that train, freight or passenger?

A. A freight train.

Q. When the train was seen to be coming out of the tunnel, did anybody tell you or any of the others to stand at the east end of the bridge for the purpose of ascertaining the point on the curve at which a train on the west bound track could be seen by a man on the east end of the bridge?

A. Yes, sir.

Q. Was that done?

A. Yes, sir.

Q. Was that distance ascertained?

A. It was.

Q. What was that distance?

A. Two hundred and twenty feet. Just a moment, I am not sure that I understood your question. Did you ask the distance that the train could be seen coming west on the west bound track?

Q. Yes.

A. Yes, sir.

Q. How long have you known Tom Holbrook?

A. All my life.

Q. Did you know him well or intimately?

A. I knew him very well, very intimately.

Q. Did you live at that time in the neighborhood or near where he was born and raised?

A. Yes, sir. We were practically raised together. My home was just about one mile from where his home was.

Q. Did you know him after he was married?

A. I did.

Q. Did you know the relations that existed between him and his children?

A. Yes, sir.

Q. Did you know anything of his intelligence as a man and a citizen?

A. Yes, sir, he was considered a very intelligent man, and a good citizen.

209 Q. Was he illiterate or an educated man?

A. He had a fairly good education.

Q. What was his character with reference to being extravagant and wasteful, or economical and saving?

A. He was considered a very economical man.

Q. Was he in any sort of business in that neighborhood in the county prior to and during the time he was a bridge man, and, if so, what business was he in?

A. He was engaged in the mercantile business with his brother-in-law, J. M. Deerfield, doing business as Deerfield and Holbrook.

Q. Was he at the same time working as a bridgeman for the Norfolk & Western?

A. Yes, sir.

Q. You have stated that he was economical. Do you know of any accumulations that he made during the time after he became a man and was married, and, if so, state what they were?

Defendant objects.

Objection overruled.

Defendant excepts.

A. Yes, I know of three investments he made in Bluefield. The first was, I believe, that he and Deerfield together bought a lot there that they paid \$500 for. They bought that in partnership. Later on they bought another lot that I think they paid \$100 for. In 1907 I sold he and Deerfield together a house and lot in Bluefield for \$1,200. You understand that at that time they were still partners in business, and that they bought this property in partnership. He made me monthly payments on that, paying it in installments, with a cash payment. He finished paying for that in March, 1911, I believe it was. Sometime prior to March, 1911, he sold his interest in this mercantile establishment to Mr. Deerfield and bought Mr. Deerfield's interest in the property in Bluefield in order that he might move to Bluefield and educate his children and give them there a better education than he could give them where he was living at that time.

Defendant's Motion to Strike Out.—Counsel for defendant now move the court to strike out the question and answer and all other evidence introduced in this case showing or tending to show what the decedent had accumulated as wholly irrelevant and inadmissible; counsel for defendant saying that counsel for plaintiff may show the habits and character and economical turn of the decedent, but that as to his earnings or accumulations that is improper, that there is considerable question, of course, as is always the case, as to whether a man's family is going to get the benefit from his investments.

Motion overruled.

Defendant excepts.

By the COURT: The motion is overruled, the court being of opinion that a man of frugal habits, who was accumulating property, would be of greater pecuniary value to his family than would a man of unthrifty habits who was not accumulating property.

Defendant's Further Motion to Strike Out.—Counsel for defendant object to the statement made in the answer of the witness as to what the decedent was moving to Bluefield for, and now moves that it be stricken out, because hearsay.

Objection and motion overruled.

Defendant excepts.

(At 12:50 P. M. with the evidence of the witness Stallard not completed, court takes a recess to 2.00 P. M.)

TUESDAY, June Twenty-fourth, 1913.

(Afternoon Session.)

Court reconvened at 2:00 P. M. pursuant to recess.

The plaintiff continued to introduce here evidence in chief as follows:

E. T. STALLARD, for Plaintiff, on stand from Morning Session.

Direct examination.

By Mr. WERTH:

Q. Do you know what the rental value is of the property which Mr. Holbrook bought in Bluefield?

211 Defendant's Objection.—Counsel for defendant object to the question for the reasons heretofore set forth.

Objection overruled.

Defendant excepts.

A. Thirteen dollars and fifty cents per month.

Q. Are you, yourself, a married man?

A. I am.

Q. Have you children?

A. One.

Q. How many children had Mr. Holbrook at the time of his death?

A. Five.

Q. Do you know about their ages?

A. The oldest I think is about fifteen years old.

Q. What is the age of the youngest?

A. About eighteen months, I think.

By the COURT: How many children did you say Mr. Holbrook had?

WITNESS: Five; and the oldest is fifteen years of age, and the youngest is a year and a half.

Q. Are you a married man, and have you any children?

Defendant's Objection.—Counsel for defendant object to the ques-

tion, and the questions heretofore asked and answered, as wholly immaterial and irrelevant.

Counsel for plaintiff does not insist upon a reply.

Q. What do you know of the manner and way in which Mr. Holbrook performed his parental duties to his minor children; what sort of a father was he? I mean, with reference to training, and guiding, and looking after his children? I do not refer to whether he was affectionate or otherwise.

Defendant's Objection.—Counsel for defendant object to the question and say that only decedent's pecuniary value to his wife and children may be proven.

By the COURT: I am of opinion that an answer to the question would tend to throw light on the pecuniary value of decedent to his children. The question properly excludes from the witness' 212 attention any mere question of the character of the decedent as to his affection for his children or the reverse, which, of course, is not of moment in this inquiry.

Defendant excepts.

A. Well, he was considered a very careful parent. I should say, in the way of training his children. He seemed to try to bring them up in the way they should come up. He gave them the advantages of education so far as he could in that place where he lived. I have often spent the night in his home during the school term, when he would gather the children around the fireside and take their books, and have them recite their lessons that they had gone over during the day, and he seemed to take great interest in their welfare along educational lines.

Q. Was he careless and indifferent, or was he solicitous and ambitious about the development and training and education of his children?

Defendant's Objection.—Counsel for defendant object to the question, upon the ground that the evidence must be confined to the pecuniary loss sustained by the widow and children, and that this question does not confine itself to the pecuniary loss.

By the COURT: I gather from the case of *Railroad against Vreeland*, 227 P. S., 59, 73, that the injury to a minor child resulting from the death of the father may include the training and instruction that some fathers would give their children, and that it is of such a nature as that in the case of the loss of the parent, tutors, or other teachers could be employed to render. In other words, there is to be no recovery under any circumstances for the sentimental loss that the minor children have sustained, but the pecuniary loss of their instructor and trainer, the loss to be measured by the cost of employing a competent person to perform the duties which some parents do render to their children. It follows, therefore, that the plaintiff may have an answer to the question asked, which has a tendency to enable the jury to measure the damage in accordance with the rule laid down by the Supreme Court of the United States,

in the event that they reach the conclusion in the case that there is liability.

Defendant excepts.

213 Q. He was solicitous and ambitious. You have stated that Mr. Holbrook was not careless and indifferent, but was solicitous and ambitious about the training and educating of his children. Please tell the jury whether or not he did in fact devote such time and attention as he could to the guidance of his children, or did he give his time and attention to things wholly unconnected with his family and parental duties?

Defendant's Objection.—Counsel for defendant repeats the objection heretofore made.

By the COURT: The same ruling will apply.

Defendant excepts.

A. He devoted such time as he could to his family and children.

Q. Do you know of any arrangement that he had made prior to his death about taking his young boys to the inauguration on the fourth of last March?

Defendant's Objection.—Counsel for defendant object to the question as wholly irrelevant and immaterial.

Counsel for plaintiff answers that that is along the line of schooling and education for his children, what the plaintiff's decedent was making arrangements to do at the time of his death, and that counsel for plaintiff knows of no similar expenditure of money by the decedent which would in so short a time have given his children an equal amount of knowledge; and that the decedent did, in fact, at Mr. Roosevelt's inauguration, take his wife to Washington, at a time before some of his children were born, and that when the others were younger; counsel for plaintiff contending that this is relevant and proper under the decisions of the court in the cases of Railroad v. McKay, Railroad v. Duke, and Railroad v. Freeman.

By the COURT: Charging the jury, as I now do, that they are to be careful, should they reach the conclusion in this case that there is any liability on the defendant, not to confuse the sentimental loss that the wife and children of decedent have sustained in the death of the father and husband, with the pecuniary loss that they have sustained by his death. I will let the question be answered.

Defendant excepts.

A. Yes, sir; such an arrangement had been made.

Q. You may cross-examine.

214 Cross-examination.

By Mr. McCORMICK:

Q. You say that you do know such an arrangement had been made. How did you get hold of that?

A. Mr. Holbrook had talked to me himself.

Q. You did not know it then, except by what Mr. Holbrook told you, did you?

A. That would be the only way, of course, I would have of knowing it.

Q. What did you say?

A. I say, of course that would be the only way I would have of knowing it.

Q. You did not know anything at all about an arrangement for taking these children to the inauguration except what Mr. Holbrook told you; is that true, or not?

A. That is true. I only know that his plans were to take them there, to the inauguration on March 4th.

Q. And you say you know it because he told you?

A. Sure.

Defendant's Motion to Strike out Evidence.—Counsel for defendant moves the court to strike out the questions and answers propounded by counsel for plaintiff with reference to decedent's intention to take his children to Washington as mere hearsay.

The COURT: The jury must learn the nature of the services in the way of training and instruction which the deceased was rendering his minor children in part by learning the character of the deceased in that respect, and it seems to me that a statement made by him of his intention concerning a then future event is admissible and is not hearsay.

Defendant excepts.

Mr. WERTH: Recognizing that this was a very close point, I did not make any argument thereon to your Honor, and after thinking over it further, I believe that I will agree that the statement of the witness with regard to the proposed journey of decedent with his children to the inauguration may be stricken from the record.

Mr. McCORMICK: Then the jury should be instructed to disregard it, as it has now all gone before the jury.

215 By the COURT: All of the statements of this witness with reference to the intention of the decedent to take his children to the inauguration at Washington on March 4th, last, had he lived, are stricken from the record and the jury will disregard same.

Q. Do you know how much of his time Mr. Holbrook spent at home?

A. Well, I don't know just what you mean.

Q. My question is a perfectly plain one. Take a week, and say how much of each week he would spend at home and be with his children?

A. Well, I believe that he made it the practice to come home about every two weeks, on Saturday night, and would stay until Sunday afternoon. I think his rule was to leave on the 3:30 P. M. train Sunday for his work.

Q. Then he was absent from his home two weeks at a time. Am I right about that?

A. I say, as a rule, I think so.

Q. He would come Saturday evening and would leave again Sunday evening. Am I right about that?

A. As a rule, yes, sir.

Q. I am talking about as a rule.

A. All right.

Q. Then, when he would leave on Sunday evening, would he again be gone two weeks?

A. Well, he would be gone from one to two weeks.

Q. So that, as a matter of fact, Mr. Holbrook spent very little time and had very little to spend with his wife and children. That is true, isn't it?

A. Yes, sir, if he was working, he did have very little time at home.

Q. While he was working he was out two weeks at a time, and spent Saturday night and Sunday until 3:30 P. M., if I understand you correctly, at home, and the balance of the time he would be out on the road at work?

A. Yes, sir.

Q. That is all.

(Witness leaves the stand.)

Mrs. SARAH E. HOLBROOK, the Plaintiff.

Direct examination.

By Mr. WERTH:

Q. Are you the widow of Tom Holbrook?

A. Yes, sir.

Q. Are you the administratrix appointed by the Wise County Circuit Court?

A. Yes, sir.

Q. And are you the plaintiff in this case?

A. Yes, sir.

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PLAINTIFF'S EXHIBIT No. 2.

And the plaintiff introduces in evidence, and, for the purpose of identification, same is marked "Plaintiff's Exhibit No. 2," certified copies of the appointment and qualification of the plaintiff in this case as the personal representative and administratrix of William T. Holbrook, which are in the words and figures following, to-wit:

"VIRGINIA:

In the Clerk's Office of the Circuit Court of Wise County, the 17th Day of February, 1913.

On motion of Sarah E. Holbrook, widow of Wm. T. Holbrook, deceased, the said Sarah E. Holbrook is hereby appointed Administratrix of the estate of the said Wm. T. Holbrook, deceased. Whereupon the said Sarah E. Holbrook appeared before the Clerk of the Circuit Court of Wise County, Virginia, and qualified as such administratrix by taking the oaths prescribed by law, and executing



a bond in the penalty of Five Hundred — with J. F. Holbrook her surety conditioned according to law, and the said Sarah E. Holbrook filed in the Clerk's office a statement containing the names, ages and residence of the heirs of the said Wm. E. Holbrook, deceased, to be recorded by the Clerk in a deed book as required by law.

Teste:

W. B. HAMILTON, *Clerk*,  
By J. D. DORTON, *D. C.*

A Copy Teste:

W. B. HAMILTON, *Clerk*.

“VIRGINIA:

In the Clerk's Office of the Circuit Court of the County of Wise, on the 25th Day of March, 1913.

Whereas, on the 17th day of February, 1913, Sarah E. Holbrook appeared in said office and was then and there appointed, took the oaths and gave the bond as Administratrix of the estate of Wm. T. Holbrook, deceased; and,

Whereas, the order entered on the order-book showing such appointment and qualification is supposed or may be informal, deceptive and irregular; and,

Whereas, said Sarah E. Holbrook has this day appeared again in said office and asked that a new order be entered, nunc pro tunc, now for then, curing such supposed informality and irregularity, on her motion the following order is made and entered as of said 17th day of February, 1913, to-wit:

On motion of Sarah E. Holbrook it appearing that Wm. 217 T. Holbrook departed this life on January 4th, 1913; that said deceased was at the time of his death a citizen and resident of Wise County, Virginia, and domiciled therein and had real estate and personal estate thereon; that said deceased has left no will, as appears from the oath of said Sarah E. Holbrook, and that said Sarah E. Holbrook is the surviving widow of said Wm. T. Holbrook; whereupon it is ordered that said Sarah E. Holbrook be and she is hereby appointed the personal representative, as administratrix, of the estate of said Wm. T. Holbrook, deceased. And thereupon said Sarah E. Holbrook appeared before the Clerk of said Court, in his said office, and duly qualified as said administratrix by taking the oaths prescribed by law and duly executing bond in the penalty of Five Hundred Dollars with J. F. Holbrook as her surety thereon, conditioned according to law; and said Sarah E. Holbrook then and there filed in said office a list, duly sworn to as required by law, containing the names, ages, and addresses of the heirs at law of said Wm. T. Holbrook, deceased, to be recorded in the manner required by law.

Teste:

W. B. HAMILTON, *Clerk*,  
By J. D. DORTON,  
*Deputy Clerk*.

A Copy Teste:

J. D. DORTON, *D. Clerk*."

*List of the Heirs, Their Ages and Residence, of Wm. T. Holbrook,  
Deceased, To wit.*

Sarah E. Holbrook, aged 32 years, and Alton D. Holbrook, aged 14 years; Eugenia A. Holbrook aged 11 years, Bessie M. Holbrook aged 7 years, Alden V. Holbrook aged 4 years, and Pansey M. P. Holbrook aged 1 year, all residing at Dwina, Wise County, Va.

This Feb. 17, 1913.

SARAH E. HOLBROOK.

VIRGINIA,

*Wise County, To wit:*

I, J. D. Dorton, Deputy for W. B. Hamilton, Clerk of the Circuit Court of the county and state aforesaid, do certify that Sarah E. Holbrook made oath before me that the foregoing statement is correct.

Given under my hand this Feb. 17, 1913.

J. D. DORTON, D. C.

218 VIRGINIA,

*County of Wise, To wit:*

In the Clerk's office of said county on the 17 day of February, 1913, the foregoing writing was filed for record and recorded the 14 day of March, 1913, in Deed Book 114, page 112, etc.

Teste:

W. B. HAMILTON, Clerk.

By J. D. DORTON, D. C.

A Copy Teste:

A. W. HAMILTON, Clerk."

Q. How old was Mr. Holbrook at the time he was killed?

A. He was thirty-eight.

Q. How many children did he leave surviving him?

A. Five.

Q. What were the ages of those children at the time of his death, in January, 1913?

A. The oldest one was fourteen, the next eleven, the next seven, and the next four, and the youngest one year.

Q. Please tell the jury which of those children are boys and which are girls?

A. The two older ones are boys, and the next is a girl, and the next is a boy, and the baby is a girl.

Q. What was the general physical condition of your husband during his life time with reference to his health? Was he a strong or weak man, a healthy or an unhealthy man?

A. He was a healthy man.

Q. Have you with you a photograph of your husband?

A. Yes, sir, I have it at the hotel.

Q. You haven't it here with you?

A. No, sir, I haven't it with me now.

Mr. WERTH: I will send down to the hotel to get the photographs, and will want to offer them when I produce them.

Mr. McCORMICK: And we shall wish to object thereto when you offer them.

Q. What sort of father to his children was your husband with reference to performing his duties as a father? Now, I do not mean whether he was fond of them and they fond of him, and whether he was good to them in the sense that he loved them, I do not mean that, but I want you to say whether he took pains in teaching his children and in educating them and in training them?

219 Defendant's Objection.—Counsel for defendant make the same objection heretofore made to a similar question which was propounded.

By the COURT: And the same rule will apply in overruling the objection.

Defendant excepts.

A. He did.

Q. State what sort of father he was with reference to being indifferent or conscientious about his duty to his children?

Defendant objects.

Objection overruled.

Defendant excepts.

A. He was good.

Q. Had he made any arrangements to take his children to Washington to the inauguration of President Wilson?

Defendant objects.

Objection overruled.

Defendant excepts.

A. He was planning to take them.

Q. What sort of man was your husband with reference to being industrious and economical?

A. He was industrious and economical.

Q. Had he bought himself a home anywhere other than the home you lived in in Wise County?

A. Yes, sir, he had bought a house and lot in Bluefield.

Q. What sort of house and lot was it; how much rent are you getting for it?

A. Fifteen dollars a month.

Q. What was his object in buying that house and lot in Bluefield?

A. He wanted to move there so that he could educate his children and so that he could be with us more.

Q. So that he could be at work and be with them more?

A. Yes, sir.

220 Q. Was it his intention to move there soon had he not been killed, or not?

A. Yes, sir.

Mr. WERTH: I now have two photographs and wish to offer them in evidence.

Mr. McCORMICK: We wish to object thereto.

(Court and counsel retire to Judge's chambers.)

Plaintiff's Exhibit No. 3.—Plaintiff offers in evidence a photograph showing plaintiff's intestate seated by the side of the plaintiff, and two children, one in the lap of each parent; said photograph, for identification, is marked "Plaintiff's Exhibit No. 3."

Plaintiff's Exhibit No. 4.—And plaintiff also offers in evidence another photograph, showing the plaintiff's intestate with four other men, which, for the purpose of identification, is marked "Plaintiff's Exhibit No. 4."

Defendant's Objection.—Counsel for defendant object to the said photographs, because there is no proof as who took the photographs in question, whether they are correct representations, or when taken, or what the situation was when they were taken; and, further, because the photographs may not reproduce the decedent just as he was at the time of his injury and death; and, further, because immaterial, and because the evidence of witnesses as to the condition of the man at the time of his injury and death is the best evidence of that condition.

Counsel for plaintiff replies and says that the photograph of intestate and the plaintiff was taken about eight years ago, and that the photograph of intestate with a group of other men was taken something over a year prior to intestate's death.

By the COURT: Mr. Werth, I think you must avow that you will prove that the photographs are correct representations of the intestate.

Mr. WERTH: I'm *at* now willing and able to avow that they will be proven to be exactly like him.

221

### Ruling of Court.

By the COURT: The court overrules defendant's objection on the authority of 1 Wigmore on Evidence, Section 792, and 5 Ibid. Section 792.

Defendant excepts.

(Judge and counsel return into court room.)

Q. Mrs. Holbrook, I now hand you a photograph of a man and a woman with two children and ask you to state what man is that a photograph of?

A. Of William Thomas Holbrook.

Q. State how long ago that photograph was taken?

A. Seven or eight years ago.

Q. State whether or not that is a fair and good likeness of your husband? (Witness weeps.) It is a good likeness of him?

A. Yes, sir, it is.

Q. Who are the other people shown in that photograph?

A. Sarah E. Holbrook, his wife, and their two children, Alton Holbrook and Eugenia Holbrook.

Q. That is a picture of yourself and husband and two of your children?

A. Yes, sir.

Q. I now hand you another photograph and will ask you to identify it and say whose picture that contains?

A. William Thomas Holbrook, Brown Anderson, Pierce Walters and the other two were Evans boys, but I don't know them.

Q. About how long ago was that photograph taken?

A. To the best of my knowledge it has been about a year.

By the COURT: From now?

WITNESS: Yes, sir.

Q. Which of the five men shown on this last photograph is your husband?

A. Which one?

Q. Yes.

A. This one (pointing on photograph).

Q. The one on the extreme right as you look at the photograph?

A. Yes, sir.

Q. State whether or not that is a good likeness of your husband?

A. It is.

Q. That is all.

No cross examination.

(Witness leaves the stand.)

222 S. B. RHODES, for Plaintiff.

Direct examination.

By Mr. WERTH:

Q. Mr. Rhodes, have you been sworn?

A. Yes, sir.

Q. Tell the jury your place of residence and business.

A. Roanoke, Va., Manager of the National Life Insurance Company.

Q. Are you familiar with the Standard Mortality Tables, or the tables frequently spoken of as expectancy tables and annuities tables?

A. Yes, sir, with the American Mortality Table, which is the one used by all Life Insurance companies and on that table are both life insurance rates and annuity rates.

Q. I will ask you to tell the jury what will be the expectancy of life of a strong and robust healthy man at the age of thirty-eight.

A. At the age of thirty-eight, according to the American Experience Tables of Mortality the expectancy of life would be twenty-nine years and sixty-two one hundredths of one year.

Q. I will ask you to tell the jury how much an annuity for six hundred dollars would cost such a man in the Equitable of New York, the Mutual Benefit, the Mutual of New York, and the New York Life Insurance Companies?

Defendant's Objection.—Counsel for defendant object to question as immaterial, irrelevant and inadmissible. Counsel for defendant admits that counsel for plaintiff may prove the earning capacity of decedent and his expectancy of life, but that that is as far as they may go. Counsel for defendant also say that counsel for plaintiff is

assuming that the earning capacity of the decedent was six hundred dollars a year, which has not been proven in this case, and for that further reason the question is inadmissible.

Counsel for plaintiff, replying says that the evidence of Foreman Anderson was that decedent made from sixty-five to seventy-five dollars a month on an average the year around, and that he also said that they were at times called out and worked extra during wrecks, floods, and on other occasions.

Counsel for defendant reply that counsel for plaintiff is in error when he says that Witness Anderson said that the decedent earned on an average sixty-five or seventy-five dollars per month, 223 when, in fact, he stated that it was sixty-five to seventy dollars a month, but he also stated that there were frequent occasions, during bad weather, rainy weather and other times when he did not work, and hence when he did not receive pay.

Objection overruled.

Defendant excepts.

A. The cost to purchase an annuity of six hundred dollars per annum at age thirty-eight in the Equitable of New York, the Mutual Benefit, the Mutual of New York, and the New York Life would be \$11,476.20.

Q. Now answer the same question with reference to an annuity of \$700 per year?

Defendant objects.

Objection overruled.

Defendant excepts.

A. The cost of an annuity of \$700 in the same companies would be \$13,388.90.

Q. Answer the same question with reference to the purchase of an annuity of \$800 per year.

Defendant objects.

Objection overruled.

Defendant excepts.

A. \$15,301.60.

Q. Answer the same question as to the purchase of an annuity of \$900 per year.

Defendant's Objection.—Counsel for defendant object to the question for the reasons heretofore set forth, and for the additional reason that there is absolutely no evidence upon which to base a question as to \$900 a year.

Objection overruled.

Defendant excepts.

A. \$17,214.30.

224 Q. Answer the same question as to an annuity of one thousand dollars.

Defendant's Objection.—Counsel for defendant object to the question and say that there is no evidence in this case upon which to base same.

By the COURT: I will overrule the objection on the ground that the jury have a right to know the cost of an annuity of a thousand dollars per year in view of the possibility that the decedent might have lived beyond the average and that he might have arrived at the point where he would have earned a thousand dollars a year. The Court's authority for overruling the objection is *Railroad v. Putnam*, 118 U. S. pp. 544-555.

Defendant excepts.

A. \$19,127.00.

Q. Answer the same question as to an annuity of \$1,200 a year.

Defendant's Objection.—Counsel for defendant object to the question because there is no evidence upon which to base it, and because otherwise improper.

Same ruling.

Defendant excepts.

A. \$22,952.40.

Q. You may cross-examine.

Cross-examination.

By Mr. McCORMICK:

Q. Mr. Rhodes, the evidence you have given is based altogether, not upon any knowledge you have, but upon the mortality tables that you have in your possession.

A. The mortality tables and annuity rates, yes, sir.

Q. And they are made up by the companies and not by you?

A. Yes, sir.

(Witness leaves the stand.)

Plaintiff closes her evidence in chief.

225 *Defendant's Motion for Directed Verdict.*

Upon the conclusion of the plaintiff's evidence in chief, the defendant, by counsel, moved the court to direct the jury to give a verdict for the defendant, upon the ground that there has been no negligence made out against the defendant railway company; and, further, that if any negligence has been shown the same has not been shown to have been the proximate cause of the accident.

Objection overruled.

Defendant excepts.

And the defendant, to further sustain the issue joined upon its part, introduced the following evidence in chief:

C. J. FRENCH, for Defendant.

Direct examination.

By Mr. SMITH:

Q. What is your name?

A. C. J. French.



Q. What is your business, Mr. French?

A. I am a civil engineer for the Norfolk & Western Railway Company.

Q. How long have you been employed as a civil engineer by the Norfolk & Western Railway Company?

A. Eleven years.

Q. Did you make a survey of the road-bed and track across Tug river at bridge 899-A, and for some distance in each direction from the bridge?

A. I did.

Q. Did you make a survey on the ground?

A. Yes, sir.

Q. I hand you now a plat or sketch, which has printed on the right hand corner, "Norfolk & Western Railway Company, Pocahontas Division, Sarah E. Hollbrook, Administratrix of William T. Hollbrook, versus Norfolk & Western Railway Company;" please look at that and see if it was made by your notes, and in accordance with your survey?

A. Yes, sir. This map was made from a survey, as per survey notes which I made at that point.

Q. Have you checked it up with your field notes to see that it corresponds with them?

A. I have.

Q. Does it correspond?

A. Yes, sir, as far as I see all the measurements of track, 226 etc., correspond, or check up. There are some lines on here, probably showing right of way lines, that I knew nothing about, relative to width of the right of way at that point. The other lines, such as the length of the bridge, the tunnel, and the track, and things of that sort all check.

Q. About how far does that plat or sketch or blue print—or, what is it?

A. It is a true map of the ground at that point. It is a map drawn up to scale to represent the actual curvature. So many inches on this map represent so many feet on the ground.

Q. About how far each way from the bridge is the track shown on that blue print or map?

A. It shows something over six hundred feet east of the mile post, which is approximately one hundred feet east of the bridge, and twelve hundred feet west of the mile post, which would really be a little over seven hundred feet east of the east end of the bridge, or about nine hundred feet west of the west end of the bridge.

Q. What is the scale of that map?

A. Fifty feet to the inch. In other words, one inch on this map represents fifty feet on the ground.

Q. Does that map show accurately the degree of curvature of the track?

A. It does.

Q. How long is bridge 899-A?

A. The bridge is two hundred and twenty-eight feet long. That is what we call the length of it; that is, from the back wall to the back wall of masonry, the two abutments.

Q. How far from the mouth of the tunnel is the west end of the bridge?

A. Well, from the center of the bridge, and by that I mean between the two tracks, to the average end of the tunnel is forty-eight and one-half feet. The masonry is not square with the track. They cross at an angle of about sixty-five degrees to the line of the track, and the face of the tunnel is not perpendicular. In other words, the tunnel leans back. As you start at the bottom of the track, the tunnel has what you call a batter on the face of it, of about two inches to the foot, and that is instead of being plumb like that (illustrating), it has a batter on it. But, taking the average height of the tunnel opening back to the center of the track, that is between the tracks to the bridge, the distance is forty-eight and one-half feet. Of course, it is farther from the tunnel to the west bound track and it is nearer from the tunnel to the east bound track.

Q. Well, at the nearest point on the east bound track, about what is it?

A. At the nearest point from the center of the east bound track to the tunnel at the bottom, which is the nearest point of  
227 the tunnel, is forty-four feet and two or three inches.

Q. Mr. French, how far towards the west could a person see a train approaching through the tunnel from the west when standing on the east bound track and about the center of the bridge?

A. I do not know that I understand that question exactly; do you mean how far west—

Plaintiff's Objection.—Counsel for plaintiff object to the question, because an unnecessary consumption of time about an immaterial and irrelevant matter; plaintiff's counsel saying that there is no controversy about seeing a train coming from the west, that the train coming from the west did not hurt anybody.

By the COURT: I think counsel for defendant has the right to develop the situation there surrounding the place of accident.

A. Well, you could see for a distance of between four and five hundred feet looking west, provided there was no train on the west bound track between the point at which you would be standing and that distance west.

Q. If standing at the same point on the bridge, how far could a man see a train approaching from the east on the west bound track?

A. Do I understand you to mean a man standing on the east bound track at the center of the bridge?

Q. Yes.

A. Do you mean a man standing at the middle of the bridge at the center of the east bound track, now?

Q. Yes.

A. How far east could he see?

Q. Yes, a train approaching on the west bound track?

A. With the east bound track clear.

Q. Yes.

A. He could easily be seen between six hundred, between five and six hundred feet east.

By the COURT: Mr. French, in answering that question that you could see a train between five and six hundred feet, do you take into consideration the cut there to the east of the bridge?

WITNESS: Yes, sir.

Q. Now, Mr. French, supposing a train should come on the east bound track and a man was standing on the east bound track and should step over on to the west bound track near the center 228 of the bridge, and that the train on the east bound track should continue on past him, how far, with that train occupying the east bound track, could a man on the west bound track at or near the center of the bridge see a train approaching on the west bound track?

A. He could readily see the front of the train four hundred feet east.

Q. Explain to the jury how you can determine that by your plat and survey?

A. Well, there are two hundred feet of that on a straight line. The curve east and west originally seemed to be of the same degree, six degree curve, but the curve as you approach near the end of the tangent gradually gets lighter. In other words, they get spiral from usage of trains running over them—the curve will run over a little longer space than originally laid out, and thereby the curve gets a little lighter. But it is practically as straight as a trackman can line it for two hundred feet east of the center of the bridge back to the mile post, and then the curve runs off lighter until it strikes the regular maximum degree of curvature around over the rest of the curve. Those tracks are thirteen feet centers, center to center of track, and there are no cars over ten feet wide. The curve going east is a curve to the right, and the outside rail of the track is somewhat elevated in that way (illustrating). Even if laying down flat you could see that far, but the track is elevated several inches higher on the curve and cars are therefore leaning away from the other track. With a train on the track going east the cars are leaning a little away, so the space occupied between that and the other tracks, with a distance of thirteen feet between centers, leaves at least eight feet of space by there that you could see through. Five from thirteen leaves at least eight feet that you could see by this track. Of course, if it was straight you could see as far as the eye would let you unless there was something in the way. But when you get around the curvature, the other train cuts you off at or about that distance. If I may be allowed to use one of those photographs I can show the distance. (Picking up photograph.) The bridge came across here and it is made up of three spans of seventy-five feet to the span. There are two abutments at each end, made of masonry, and two piers out from between the abutments which makes three spans to the bridge. Each of those spans has seven main floor beams across them, as they are called. The eleventh floor beam, counting from the end, is right at the middle of the bridge, at this point (indicating on photo-

graph). You can see back to the end of that cut, showing that that track, before it gets to the maximum curvature, is at the end of the cut and it is four hundred feet. From the middle of the bridge to the end of the cut it may be readily seen. There is the end of the cut that shows up plainly, at that bunch of ties. That point is four hundred feet from the middle of the bridge. So you see a train would have to hang almost over to the other end of the other ties before it would cut off your view.

Q. Some of the jurors could not see your pencil when you were pointing out the different places on that photograph, and I will ask you now to turn around and explain it to the other members of the jury.

A. The point where I hold my pencil on the photograph is the eleventh floor beam from the east end, and is the center of the bridge. The west end of the cut, on the left, is at the point where I have my pencil, where the cut runs out to where there was no excavating, where they didn't have to make any cut. In other words, that is where the excavation and fill begin. That is four hundred feet on the photograph by actual measurement from there back to the middle of the bridge; it is four hundred feet along the west bound track. A train on this east bound track would have to hang way over to the ends of these ties to cut off your view, and of course a train does not, in fact, hang over to the middle part between the tracks, because a man can walk between two trains when running by each other.

Plaintiff's Objection.—Counsel for plaintiff objects to the answer being given by the witness, and says he is going beyond the province of a witness and is getting upon the ground of argument.

By the COURT: I hardly think so, Mr. Werth. I take it that he is giving facts there.

Q. Go ahead, Mr. French.

A. This photograph marked No. 5 does not show back to the center of the bridge quite, but it shows this end of the cut a little plainer than the other photograph shows it. It shows the bunch of ties. That point where I hold my pencil now represents the end of the cut on the left, the same as I showed you in the other photograph. That is the same distance, four hundred feet back to there, and shows that a man standing on that west bound track could easily see a train approaching on the west bound track if there was another train on there, four hundred feet or over, because cars on this track would have to hang way over to the middle of the track, which would be six and one-half feet, in order to cut off the view, when, in fact, none of the cars are over ten feet wide.

230 Q. Now, suppose a man was standing on the second floor beam from the east end of the bridge and very near the north side of the bridge, and a train was passing on the east bound track, how far could he see a train approaching him on the west bound track?

Mr. WERTH: Who was the man placed on the west side of the second floor beam of the bridge in your question?

Mr. SMITH: That is where I understood Mr. Harrison to have placed Mr. Carbaugh when this train approached.

A. He could have seen it at least three hundred and fifty feet east.

Q. Mr. French, does this photograph No. 1 show the floor beams of the bridge in question, and can you point them out to the jury on the photograph?

A. It shows the floor beams. Of course you can not see in the picture quite all the floor beams on account of the track, but it shows where the floor beams are exposed to the line of vision from the position occupied by the camera.

Q. Does it show where the floor beams cross the bridge from side to side between the tracks?

A. Yes, sir, it shows the floor beams very plainly between the tracks, and also on the outside, especially in one of the tracks in this photograph. On the left hand side in photograph No. 1 it cuts out a view of the main floor beam, but shows the bracket which connects the floor beam with the main girder.

Q. Mr. French, how far is it from the ends of the ties on the east bound track across to the ends of the ties on the west bound track?

A. Do you mean the distance between the ends of the ties?

Q. Yes, of the east and west bound tracks.

A. They average about three feet, one inch.

Q. Are there brackets that connect the floor beams with the girders, every floor beam?

A. Yes, sir, there is a bracket at each and every floor beam.

Q. Do the photographs which have been shown to the jury correctly represent those brackets that connect the floor beams with the girders?

A. They do.

Q. How far are the floor beams apart?

A. They are all, starting from the first floor beam east and counting it as one and going west they are nine feet, eight and one-half inches apart, except where they cross over two piers. That is between floor beams Nos. 7 and 8, and between floor beams  
231 Nos. 14 and 15, and they are 17 feet apart. But they are at the ends of the girders, where the floor beam of one girder goes to the floor beam of another girder, and there is concrete masonry under that place, in between. I mean, in between floor beams Nos. 7 and 8, and floor beams Nos. 14 and 15.

Q. Are the piers shown on the map or drawing?

A. They are.

Q. And does the drawing show over those piers the floor beams that you have mentioned which are farther apart than the other floor beams?

A. It does.

Q. One pier is situated in Tug river, according to the drawing on the map that you hold, and about the center of the river. Is that correct, as shown on the ground?

A. I think that is about correct on the ground. I am not positive

just where the edge of the water does come to. The river is nearer the west end of the bridge. It makes a kind of curve and sweeps around.

By the COURT: What do you call the girder; the thing that looks like the sides of the bridge in the photograph?

WITNESS: That is the main sill which carries the weight from one piece of masonry to the other.

Q. There is a girder on each side of the bridge; is that correct?

A. Girders run on either side of the track. That is, on the outside of the east bound track, and on the outside of the west bound track.

Q. Mr. French, what is the distance between the foot of the bracket on the girder and the rail of the track next to the girder?

A. It is thirty-one inches from the foot of the bracket to what we call the gauge line of the running track; that is, the rail. You will notice that this shows four rails, but the inside rails here are merely steel guard rails placed on the inside to protect the train in case a wheel should get off. If a wheel should get off on this side, this would hold it near to the regular running rail that way, and if a wheel should get off on that side this steel guard rail would hold the wheel near to the running rail on that side, so that the car would be held close to the running rail until the train got over the bridge, and thereby keep it from injuring the bridge. These are steel guard rails placed inside of the gauge rail, which gauge rail the flange of the car runs against to hold the wheels on the track. From that point back to the end of the bracket it is thirty-one inches.

232 Q. How far is it from the track to the sides of the girder?

A. Do you mean from the center of the track?

Q. From the rail?

A. It is five feet four inches from the gauge line of the rail back to the side of the girder, which would make the foot of the bracket come out thirty-three inches from the girder.

Q. Mr. French, what do you call the lower part of the girder? Do you, or not, call it the flange of the girder?

A. Yes, the lower part of the girder is the bottom part of the girder, and which is the flange. There is a top and a bottom flange, that are alike, that is, in width across. Here is the top flange and here is the bottom flange. Here is the bottom part that projects out about seven inches. On this photograph it represents a man standing with one foot on the flange of the girder, and the other foot resting on the iron plate that connects the flange on the floor with the flange on the girder, and that has a little diagonal brace riveted on it that goes across to the track to keep it from swaying, and is what we call a sway brace. Here we have them at the bottom eighteen inches wide.

Q. How far is that lower flange of the girder below the track?

A. It is about three feet below the tops of the ties. I mean, it is about three feet from the tops of the ties to the top of the flange, to where the man is standing as shown in photograph No. 3.

Q. Well, now, show the jury by photograph No. 3 where a man, or men, could get if they wanted to get off the west bound track in

order to be amply protected from being hurt by a passing train, or get against the north girder of the bridge?

A. Taking photograph No. 3 and looking the way the photograph is taken, going east, this is the north girder of the bridge. This is the west bound track. Over there in the distance is the east bound track. These girders, of course, are about on an average of nine feet high. From top plate to bottom plate is nine feet eight inches, center to center. When you get near the middle there are plates added at the bottom and top to strengthen the girder. The bottom flange is about three feet below the rail. This floor beam is about thirty-one inches from the top of this place to the bottom of the flange, about the thickness of the floor beam going across. That is, from the underneath side, about three feet from the top of the floor to the top of the bottom of the flange. Clear across that it is about eighteen inches wide, but there is the thickness of the main girder, and these little

233 rivets and plates, which leaves about seven inches of the flange sticking out. This plate is about twenty-one inches lengthwise and eighteen inches wide, which gives a man lots of room to stand on. He is well protected, because this bracket stands out at the top about seven inches and at the bottom about thirty-three inches. So a man would have to be pretty wide out here in the stomach to stick out far enough for anything to hit him.

Q. Now, Mr. French, I will ask you if a man can clear by standing on the end of the floor beam in connection with those brackets. Explain that to the jury. I mean, without getting down on the flange of the girder.

A. Of course, more of a man would be exposed, but he can stand here and be protected by the seven inches sticking out on that floor beam. As these floor beams go on the way back to the main girders, they are eighteen inches wide on top, and they are sticking out, and a man would have six feet from there to the top of his head, and underneath the top of the girder that man could get back against the girder and stand there. It wouldn't be as safe, but there would be plenty of clearance unless something was sticking out to hit him for him to stay on the middle of one of those floor beams between the tracks. He would really be in the clear.

Q. Would a man be in the clear on one of those concrete piers if two trains were passing at the same time, if he were on top of the pier between the tracks?

A. Yes, he could be in the clear between the tracks. As I said, between those floor beams, seven and eight, which is the last beam of girder No. 1 and the first beam of girder No. 2, there is a concrete pier, and there is a space between the two floor beams of 17 feet. That concrete pier is under there, and a man instead of stepping off on a floor beam, he would have a concrete pier, like a concrete floor to step down on and be clear on that.

Q. How far is that down from the floor beam?

A. That would be about three feet, or three and a half feet from the top of a tie down to the top of the concrete.

By the COURT: One of the jurors wants the witness to place the



two concrete piers near the middle of the bridge. How far is each one from the middle of the bridge?

WITNESS: Of course each one of them is practically one-third of the distance from the end. As I say, these things do not come across the bridge square with the track, but are at an angle of about sixty-five degrees. They are placed practically one-third of the distance each way. The main girder on the outside of the track is seventy-five feet long, for each one.

234 By the COURT: So as to place it that the jury may understand it, how far would a man have to go from the center of the bridge in order to get to either one of the piers?

WITNESS: He would not have to go over thirty-five feet to get to either one of them.

Q. The middle of the bridge is just about midway between the piers?

A. The middle of the bridge is midway between the piers, at the center.

Q. Did you measure to see how far a man standing, as you described the man to be standing as shown on photograph No. 3, would be from a passing train on the west bound track, and, if so, state it?

A. No, I didn't measure to see how far he would be from a passing train, but I have the measurement to the girders, and the train, as I say, would have a clearance, and from the clearance of the train it would be two feet, eight and a half inches at least back to the girder. So a man would have to be two feet, eight and one-half inches back before he would be likely to be touched by any part of a train.

Q. You stated you measured this from the rail. How far was it from the rail?

A. It is five feet, four and one-half inches back to the girder from the rail.

Q. Could a man get down on the flange of a girder at every place where there was a bracket with ease?

A. He could.

Q. Take the witness.

Cross-examination.

By Mr. WERTH:

Q. Mr. French, you have explained from the photographs and map, which you have used, elaborately and at great length as to the room that a bridge man would have on that bridge in order to get in the clear, frequently having used the statement to the jury that he would have lots of room to stand on and be well protected. I want to ask you to tell the jury if you did not assume in each one of those statements that the man had ample time to get to those places?

A. Why, I assume that he had time to get there, of course. If he wouldn't get there, he wouldn't be there.

Q. Of course. You have stated in answer to a question as to how far a man standing on the middle of that bridge could  
235 see a train approaching on the west bound track, with a train going east on the east bound track, that it would be four

hundred feet. That measurement was made, if I understood you correctly, from the middle of the bridge?

A. I think that was the answer that was given, from the middle of the bridge.

Q. At the time that those measurements were made by you, there was no train actually going east on the east bound track, was there?

A. There was not.

Mr. SMITH: I overlooked a question, and think it would be better for me to take it up now and finish it so that Mr. Werth may continue his cross-examination in the regular way.

Mr. WERTH: All right.

Mr. SMITH: Mr. French, when did you make these notes and surveys for that map that you have?

WITNESS: On Wednesday, May 28, 1913.

Mr. SMITH: Had there been any change in alignment of the track at that point since January 4, 1913, up to the time of your making those notes?

WITNESS: There has been no material change that I would say would be noticeable. I have been over that work often in the last, I would say, twelve months. There might have been, of course, a section man keeping up the track, and reballasting, and probably a re-alignment an inch or two, or something like that, but the material alignment is the same.

Mr. SMITH: Where are you located, Mr. French?

WITNESS: Well, we have an office in Bluefield. The territory that I work over extends from Roanoke to Kenova.

Mr. SMITH: And this was in your territory, was it?

WITNESS: This was in my territory.

Defendant's Exhibit B.—Counsel for defendant now offer the map in evidence, and, for the purpose of identification, same is marked "Defendant's Exhibit B."

236 Mr. WERTH: (continuing cross-examination):

Q. You have stated that if a man was standing behind the second brace from the east end of the bridge he could see an approaching train going west on the west bound track when within a distance of three hundred and fifty feet, I believe?

A. I did.

Q. You have stated that you were a civil engineer, and you are an expert mathematician, I suppose?

A. I didn't say so.

Q. I am asking you, if as a civil engineer you are not an expert mathematician?

A. I never claimed to be an expert mathematician.

Q. I will ask you to assume that a train is going west on the west bound track at the rate of forty miles per hour, and will ask you how long it would take it to run that three hundred and fifty feet, how many seconds?

Defendant's Objection.—Counsel for defendant object to the ques-

tion, because there is no evidence that the train in question was running at the rate of forty miles an hour, and say that it has only been proven that that was the maximum limit allowed this train, and that the truth is that it was running between thirty and thirty-five miles an hour.

Counsel for plaintiff replying, says that the maximum allowed that train is forty miles and that there is proof in this case that the train was running at about that rate of speed at least.

Objection overruled.

Defendant excepts.

A. It would take practically six seconds.

By the COURT: Having overruled that objection, I will now ask the witness to figure this train as running at the rate of thirty-two and a half miles an hour, being half way between the thirty and thirty-five miles an hour mentioned by counsel for defendant in their objection.

WITNESS: It would take practically seven and one-third seconds.

237 Q. I will ask you to assume that a train going at the rate of forty miles an hour blows its whistle when within one hundred and fifty feet of the east end of the bridge, and when on the west bound track, and that there was a man standing about or near the middle of the bridge, enveloped in thick smoke, and that that was the first warning of the approach of that train that he heard. How long would it take that train to go to the man in the middle of the bridge?

Defendant's Objection.—Counsel for defendant object to the question because there is no evidence upon which to base such a question.

Objection overruled.

Defendant excepts.

A. About four seconds.

By the COURT: Mr. French, which figures did you use in making up your answer, one hundred, or one hundred and fifty feet?

WITNESS: I took between the two points.

By the COURT: Midway between the two points?

WITNESS: Yes, sir.

Mr. WERTH: Your honor will observe that in putting it at one hundred and fifty feet I have taken half of the distance that the witness himself has said the train could have been seen. I have taken the one hundred and fifty feet so as to fairly represent Mr. Harrison's statement that it was very near the bridge. Under those circumstances, I think I can have an answer as to one hundred and fifty feet.

By the COURT: I think the witness has made a correct answer to your question, Mr. Werth, because you gave him two distances, one hundred to one hundred and fifty feet, and he took midway between the two distances.

Q. All right, that is all.

## 238 Re-examination.

By Mr. SMITH:

Q. Would a man walking on the guard rail, and supposing him to be midway between one floor beam and another, have time to clear in six seconds?

Plaintiff's Objection.—Counsel for plaintiff object to the question, because the witness on cross examination has been asked for a mathematical calculation, which was given, and the jury is as well able to decide after getting that information as is the witness.

Objection sustained.

Defendant excepts.

Q. Can you make a calculation of a man walking four miles an hour and tell me how long it would take him to get to the floor beam from a middle point between the guard rails?

Counsel for plaintiff objects to the question, because four miles an hour is fast walking on a granolithic pavement, while this man was walking on cross-ties with open spaces between the ties; and further, because the jury knows as well how fast a man walks as does this witness or anybody else.

The COURT: I will sustain the objection and ask a question myself.

Defendant excepts.

By the COURT: Assume a man to be midway between two floor beams nearest the center of the bridge, walking west on the north guard rail, with an unobstructed vision, going at the rate of four miles an hour, how long would it take him, in point of time, to reach the floor beam that he was headed for?

Mr. WERTH: It is with some diffidence that I rise to except to a question asked by the court, but I feel that I must do so, because a man can not walk four miles an hour on a bridge.

By the WITNESS: It would take him less than one second. I might suggest right there, if it would be of any advantage in understanding the matter, that the regulation army step is less than four miles an hour, being 3.4 miles per hour, or five feet to the second. That is, thirty inches to the step and one hundred and twenty steps to the minute, which would be five feet to the second. In that case five feet would be the nearest point, and it would take him probably one second to reach it, or, at the rate of four miles an hour, it would take him less than one second.

Mr. SMITH:

Q. Then, at the rate of two miles an hour it would take him twice that long, would it?

A. Twice as long as would be required at the rate of four miles an hour.

Q. That is all.

By a JUROR: I want to know about those two floor beams seventeen feet apart. If a man were midway between those, would he

have the same chance for safety in getting off the bridge that he would have if between the floor beams only ten feet apart?

WITNESS: Yes, the same, and, if anything a little more so, because the piers that you can not see under here are under there taking up the space and are something like eleven feet wide across the top. The first distance would be nearer, but the point at the pier is only about six inches different. A man could jump down on to the pier without any fear of falling off, because they are good wide things, and would be getting down on the floor. On the other hand, in grabbing hold of a bracket, a man has only seven inches to hold to. For every other one of the floor beams there is a plate which is 23 x 18 inches, which is quite a good size little thing for a man to stand on, but the seven inch projection is the other one. So really a man would be in greater safety in connection with the pier, because, if in a hurry, he could jump on it without any fear of falling off.

By another JUROR: At any point on the guard rail, which would he have the best advantage to escape from, the north or the south rail; would he have any more advantage on the north than on the south?

WITNESS: Any more what?

240 A JUROR: Would he have a better chance to escape danger from the north rail than from the south rail?

WITNESS: If he was on the south rail of that track, of course he would have just to cross the distance of the track. He would have that extra length.

A JUROR: Could he escape danger from this guard rail as quick as he could from the other one? Could he jump anywhere on that side (indicating on photograph)?

WITNESS: Of course it would be better for him if he was on the side of the guard rail next to the main girder.

A JUROR: That is, on the north side?

WITNESS: No, on the south side. At this particular point and this is on the north side of this west bound track; of course he could clear by getting down between the bridges, like that man is shown to be on the photograph.

A JUROR: In order to do that he would have to get on the floor beam?

WITNESS: Yes, sir.

A JUROR: Over there, couldn't he jump off anywhere?

WITNESS: Oh, no, he would have to get off on the floor beam and have something to hold to.

A JUROR: I did not know whether there was any difference, or not. That is all right.

WITNESS: No, it would be the same. He would have to be on a floor beam.

By Mr. WERTH:

Q. Do any of the photographs, numbered from 1 to 5, inclusive, show any part of the piers you have described?

A. No, I think none of the photographs show that. The vision is cut off. The piers——

Q. That is all I have asked you. Could any photographs have been taken of each one of those piers?

A. Photographs could have been taken.

241 By Mr. SMITH:

Q. Could they have been taken from the top of the bridge?

A. Not well. They could not have been well taken without you could have almost gotten the camera up here and looked down between the floor beams. You might have had one of those cameras that you hold up and look down between the bridge. The floor beam is right over the top here, and the bottom cuts the view or vision off. In here, if you will notice, it all shows black, in between. That might be light from the top under there which shows dark. The pier may be in there, but not shown. Photograph No. 3 might show a part of the pier, but it being kind of sandy on the bank there, and concrete being something near the same color, it is hard to tell when you look through that open space whether you see the concrete or the ground below.

Q. I will ask you to look at photograph No. 5 and see if that does not show the top of one of the piers, near where the man is sitting.

A. Yes, I suppose that showing grey in there is the pier, that the man is sitting on, because it is practically directly over where the pier is. This floor beam that we see here is the last floor beam of this girder. This floor beam is the first floor beam of the second girder. These little braces he is sitting on are the diagonal braces across connecting from one girder to the other, across the end of the bridge. So that must be the pier in there, as that is the place where it is. There is something shown in there.

Q. Where his feet are resting?

A. Where his feet are resting. I only see one of them, I believe, no, there are both of them.

By Mr. WERTH:

Q. You are merely guessing that that is the pier and cannot look at this photograph alone and tell whether that is the pier or not, can you, without referring to the map and making measurements, as you have done, to discover where it might be?

A. Well, of course I only see with the light that is there, and it is so dim under there it would be hard to tell. Of course you can see a flat space under there, but what you do see, whether that would be ground under there, or not, you can hardly tell. I can tell from that man's position, and knowing from the measurements, where that pier is, and with reference to the floor beams that the pier is between them, therefore it must be the pier there instead of the ground.

242 Q. That is exactly what I asked you, and what I have been asking. That is, if you are not figuring out and trying to draw the conclusion from other things that that is the pier;

that because other things appear there that the pier must be there. You do not see any pier there on that photograph, and the photograph would not show to any other living being than yourself that that is the pier?

A. It might show very plain to the man who was sitting on there, if he were asked——

Q. (Interposing.) Looking at the pier itself?

A. What did you say?

Q. I am asking you to look at the photograph itself, and does that photograph indicate to any living man that that is a pier there?

A. That is what I say. I answered your question by saying that this man, who is living, might say that it shows the pier to him.

Q. Certainly, when the photograph was taken and he was there.

A. He might look at it now, and knowing, as I say, that he was sitting on it, or that his feet were on it.

Q. I am asking you if a man who has not been there, whose sole source of information is these photographs—and when I say any living man, I am not talking about any man who has been there when the photographs were taken, but any living man who is depending upon seeing these photographs as they now are. Is there anything in either one of these five photographs to indicate that there is a pier under that bridge, judging by the face of these photographs themselves?

A. There is something indicated there, but as to whether it is a pier, or the reflection of light, or the ground underneath, I couldn't tell.

Q. And nobody else could tell, could they, from the photograph?

A. I don't know what anybody else's opinion would be.

Q. I want to ask you one other question: You said something just now in response to a question by counsel for defendant about how photographs of the piers could be taken, by just looking down under it. I want to ask you if you mean to tell the jury that a photograph distinctly showing these piers could not have been conveniently and readily taken and developed so as to show them distinctly and plainly to the jury?

A. Not from off the bridge.

Q. I know of no law limiting the place at which a photographer may take a picture or requiring him to be on the bridge or off the bridge. I believe they generally select the best place to take them. I have not asked you if a photograph could be taken off the bridge, of course. I will ask you to answer the question I put to you.

A. I will ask the stenographer to read it. (Which is done.) It could have been taken.

Q. That is all.

(Witness leaves the stand.)



243 GEORGE C. DAVIS, for Defendant.

Direct examination.

By Mr. SMITH:

Q. Mr. Davis, what is your business?

A. Photographer.

Q. Where do you live?

A. Roanoke, Va.

Q. Where have you practiced your profession, or business?

A. You mean my place of business?

Q. Yes.

A. 104 Salem Avenue, W.

Q. Roanoke, Va.?

A. Yes, sir.

Q. Did you take any photographs of bridge 899-A on the Norfolk &amp; Western Railway showing the bridge and showing different things in connection with the bridge?

A. I did.

Q. When did you do it?

A. May 28, 1913.

Q. I show you a photograph marked No. 1. Please explain to the jury what that photograph represents, and if you took it?

A. I did take it.

Q. Explain to the jury what it represents?

A. This photograph represents a view from the east end of the bridge, looking towards the tunnel, looking west at Pando.

Q. I show you a photograph marked No. 2. Say if you took that photograph and explain to the jury what that represents?

A. I did take it. The camera was set ten feet west of where Holbrook was standing when Carbaugh told him and the other men to get off the track, and photo being taken looking east, showing the length of vision that Holbrook had east of the bridge of a west bound train had he looked to see and been looking east, and the hat represents the place where Holbrook was standing at the time.

Mr. SMITH: Your Honor, I did — know that the witness was going to give the answer that he did give, and did not know that he had such a memorandum before him.

Counsel for plaintiff moves the court to strike out the answer.

By the COURT: The jury will disregard Mr. Davis' statement. Say in a general way which way the machine was pointing.

WITNESS: Oh, yes, I will do that, I did not know what Mr. Smith wanted.

A. The camera was looking east, and was about the center of the bridge.

244 Q. The camera was set about the center of the bridge?

A. Yes, sir.

Q. And pointing east?

A. Yes, sir.

Q. And the view shows looking east from the center of the bridge?

A. Yes, sir.

Q. Now, I show you photograph No. 3, and ask if you took that, and explain to the jury without reference to whether anybody told you anything, or where anybody was, what that represents.

A. I did take that one. That represents the north side of the bridge, looking east.

Q. Where was the camera set looking east?

A. Set over the north rail of the west bound track.

Q. Well, was it set near the west end of the bridge, or how far from the west end of the bridge?

A. Near the center of the bridge.

Q. I show you photograph No. 4 and ask you if that is one of the photographs you took, and, if so, explain to the jury what that represents?

A. It is one of the photographs I took. That represents a view looking east, and further west on the bridge, say about ten or fifteen feet west of the west end of the bridge the camera was located.

Q. Photograph No. 4 shows a view of the bridge set ten or fifteen feet from the west end of the bridge, and showing a view towards the east end.

A. Yes, sir, looking east.

Q. I show you photograph No. 5, and ask you if you took that, and, if so, what that represents, and where the man is sitting who is shown in that photograph?

A. I also took this photograph, in the center of the bridge, between the two tracks, looking east, however. The man you see sitting there is sitting right over the center of one of the piers. The pier may be seen under his feet.

Q. Do you recall how many piers were under that bridge?

A. Two.

Q. Is that the only photograph that you took in which the piers are shown?

A. No, sir, here is one.

Q. What is the number of that?

A. No. 3.

Q. Show the jury where any portion of the pier is shown in that photograph?

A. This is the portion of the pier here that is visible, right under the man's feet.

Q. Take photograph No. 5, first, and can you indicate on that photograph where the pier is shown, and what part of the pier is shown in the photograph?

A. You want me to outline the part of the pier that is visible.

Q. Yes.

A. Here it is; I will mark around it with a pencil.

Q. Show that to the jury.

A. The pier is within these pencil marks. This shadow  
245 of the cross beam came down on the pier, and this is the shadow of the man's feet.

Q. Mr. Davis, the point or place on the pier which is shown in

photograph No. 5 and which you have just pointed out, what part of the pier is that?

A. A portion of the top.

Q. Near the center?

A. Near the center.

Q. Which edge of the pier was it near to, the east or west, if either?

A. Well, it was nearer the west edge.

Q. Near the west edge?

A. Yes, sir.

Q. And between the tracks?

A. Yes, between the tracks.

Q. Now, in regard to photograph No. 3, what part of the pier is that that is shown in that photograph, that you have pointed out to the jury? Mark it with your pencil and tell the jury what part of the pier it is.

A. That is a portion of the west side of the pier and near the north end of the pier. That is, with the camera looking down on the west side of the pier.

Q. Do you know whether or not the girder of the bridge sets on that pier?

A. I wouldn't say.

Q. Are these photographs accurate representations of what you saw there in reference to that bridge, and do they represent the bridge as it was when they were taken?

A. These photographs are prints made from the negatives as seen by the camera without any alteration.

Q. I suppose the camera was focused properly and shows with photographic accuracy?

A. Yes, sir. I suppose so; I hope so, any way.

Cross-examination.

By Mr. WERTH:

Q. How many piers are under that bridge?

A. Two, to the best of my knowledge.

Q. Where are they located?

A. The distance, do you mean?

Q. What part of the bridge are the piers located under?

A. I wouldn't state.

Q. Do you know whether the piers are at the end of the bridge, or the middle of the bridge, or where?

A. Two piers are located between the two ends. I will say that.

Q. That is very obvious, but that is as near as you can come to it?

A. That is as near as I want to come to it, because I didn't pay attention.

Q. You could have taken photographs of those two piers so as to show the piers with photographic accuracy without any trouble, had you been requested and allowed to select the position from which to take them, could you not?

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A. And not show the bridge?

Q. Oh, no, not necessarily show the bridge. You can show the bridge if you want to, but having in view as the principal object of the picture a development of the piers, that could have been done, and easily, had you been requested to do it, could it not?

A. I claim to be a pretty good taker.

Q. What is that?

A. I am pretty good taker. I don't see why I could not have done it.

Q. You mean to say by that answer that you could have done it?

A. I could, sir.

Q. You could take a photograph of anything, that is, in the sunshine?

A. Yes, sir, in the sun.

Q. That is all.

Re-examination.

By Mr. SMITH:

Q. Could you have taken a photograph showing the tracks on top of the bridge, and also showing the piers at the bottom?

A. No, sir.

Q. Were you directed to take photographs except showing the tracks?

A. The photographs I have here were the ones I was instructed to make.

Q. Which showed the tracks?

A. Yes, which showed the tracks.

Q. And No. 3 and No. 5 do show the piers?

A. Yes, sir.

Q. Or a portion of the piers?

A. Yes, sir.

Recross-examination.

By Mr. WERTH:

Q. You were asked if you could take a photograph showing the piers and the track on the bridge, and you said "no, sir." You mean that you could not show those two things in the same photograph?

A. I could show a portion of one pier and the track in one picture.

Q. You could have taken separate exposures and gotten both readily, couldn't you?

A. Of the entire pier?

Q. You could have taken several exposures and shown the track separately and the piers separately and gotten both?

A. I could have gotten under the bridge and taken the piers and gotten up on top of the bridge and taken the track.

Q. Certainly. That is all.

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*Defendant's Exhibits C, D, E, F, and G.*

And the said photographs are introduced in evidence, and, for the purpose of identification, are marked as follows:

Photograph No. 1—Marked "C."

Photograph No. 2—Marked "D."

Photograph No. 3—Marked "E."

Photograph No. 4—Marked "F."

Photograph No. 5—Marked "G."

(And, at 6:10 P. M., court adjourned until tomorrow morning at 9:30 o'clock.)

WEDNESDAY, June Twenty-fifth, 1913—(9:30 a. m.)

*Continuation of Evidence Introduced by Defendant.*

C. W. ANDERSON, for Defendant.

Direct examination.

By Mr. McCORMICK:

Q. You have been upon the stand before and have testified in this case, I believe?

A. Yes, sir.

Q. I understand you to say that you have been in the service of the Norfolk & Western Railway Company for twenty-six years?

A. Twenty-five years, or something like that.

Q. And have been a foreman for how long?

A. About twenty-two years.

Q. Assuming, or supposing that the work being done on the track on January 4, 1913, was the preparation of new guard rails to take the place of old ones, and that other trains were approaching, will you say whether or not that was an occasion that required either the placing of a torpedo, or the putting out of a flagman or giving any notice to the engineman?

Counsel for plaintiff objects to the question, because it leaves out the material facts involved in this case upon which the witness should base an opinion.

By the Court: At the instance of the defendant's counsel I sustained that objection to exactly a similar question put by the plaintiff's counsel in several instances, and now make the same ruling. The objection is sustained.

Defendant excepts.

Q. What is the object of sending out a flagman, and under what circumstances do you send out one?

A. Whenever the track is torn up, or there is an obstruction that cannot be moved promptly, we always flag.

Q. Would this be an obstruction to the track, the work that was being done there, such as I have described in my first question?

Question objected to by counsel for plaintiff; whether it would be an obstruction to the track would depend upon circumstances which might impede or facilitate the removal of the obstruction, such as the distance within which approaching trains could be seen, the speed of those trains, and whether or not the men who are supposed to remove the obstructions were enveloped in smoke, or otherwise.

By the COURT: I think that the witness is simply being asked to express *and* opinion as to whether or not the circumstances in the case at bar required a flag to be out in the exercise of reasonable care, and that this is a question that the jury will have to answer. The objection is sustained.

Defendant excepts.

Q. What is the occasion or purpose of sending out a flag; is it for the protection of the men on the track or of the train, as a general rule.

Question objected to by counsel for plaintiff. If counsel intend to prove by that question that it is never the duty of the railroad company to protect anything but their trains and never their duty to protect their men from their trains, then we say that such an assumption cannot be entertained by the court. I assume in the question that counsel are seeking to prove that it is the duty of the railroad company only to protect their trains and leave the lives of their men subject to all contingencies.

Mr. McCORMICK: We are making no such contention as that. We are claiming here in answer to your objection that we gave ample warning and protection, or ample opportunity for the  
249 protection of these men on the track at that time. The point here is whether or not on occasion of this sort it was necessary to send out a flag. The judge has ruled that out, if I understand the ruling of the court. Now, the point is under what circumstances do you send out a flag. Is it for the protection of the men on the track, or is it for the protection of trains?

Mr. WERTH: May I ask counsel a question? Do not you expect an answer to that question to be that you send out a flag only when the safe passage of a train would be endangered, and the track was torn up and to protect the train; isn't that the testimony that you are seeking to elicit?

Mr. McCORMICK: The testimony that I am seeking to elicit is that it is only for the protection of the train that a flagman is sent out, and that we do that as a general rule.

Mr. WERTH: That is what I thought. Then I submit that my objection is well taken, that such an assumption as that cannot be entertained, because the railroad company owes a duty to its employees as well as to its passengers.

Mr. McCORMICK: We do not deny that we owe a duty to the employees.

By the COURT: Mr. Anderson, without making any reference to this special case and confining your attention to the general rule and usage on the road, you may say whether a flag is, as a rule,

put out for the protection of the men or for the train only, or both, or whatever the facts may be.

A. We send out flags for the protection of the train.

Cross-examination.

By Mr. WERTH:

Q. Mr. Anderson, do you know Mr. Carbaugh?

A. Yes, sir.

Q. He is your assistant foreman?

A. He is.

Q. He was on bridge 899-A when this accident occurred, in charge in your place?

A. He was in my place, I suppose. He was there.

Q. It is admitted he was there, and he is here in attendance on the court, is he not?

A. Yes, sir, he is here.

Q. Now, Mr. Morris, I will get you to read the second question and answer in the direct examination of this witness. (Question and answer read.) I have had read to you the question and answer which you made in chief, in which you seemed to intend to say that a flag is sent out only when the track is torn up. In the other question that you answered, being the last one that you answered, in chief, you used this language: "We send out a flag for the protection of the train." I understand you to intend to say by these two answers that you send out flags only for the protection of trains, and never for the protection of the employees on the bridge; is that correct?

A. I do not remember an occasion where I sent out a flag for the protection of the men.

Q. In your last answer you used the pronoun "I" and in the previous answer you used the pronoun "We." Now, just whom do you intend to indicate by those two words "we" and "I"?

A. Perhaps I had in mind the gang, or foreman, or assistant foreman.

Q. Who do you mean by "we"; the gang or the assistant foreman?

A. For us, that is what I had in my mind.

Q. You did not have in mind the rules of the defendant company, did you?

A. No, sir, I do not think I did.

Q. I want to ask you now if you mean to swear to that jury that under no circumstances whatever are any steps taken to protect the men working on a bridge?

Question objected to by counsel for defendant because it is misleading.

Objection overruled.

A. I just answered that I do not remember a case where we had to send out a flag for the protection of the men. I would not say that under no circumstances would I send out a flag for the protection of the men.



Q. I understand then that your answer, not only to my last question, but the answers to the questions put to you by the counsel on the other side with reference to what you have done heretofore, are as to your own personal experience only; is that correct?

A. Yes, sir; that is what I mean to say.

Q. And even you admit that under some circumstances even you might send out a flag or take some other precaution to protect the men on the bridge?

A. Yes, sir, I would.

Q. I believe you testified as a witness on behalf of the plaintiff in this case; is that correct?

A. I do.

Q. You stated that it was your duty not only to know the rules of the defendant company yourself, but to inform and see  
251 that your assistant foreman was familiar with and knew them, did you not?

Question objected to by counsel for defendant.

Objection overruled.

Defendant excepts.

A. I believe I made that statement.

Q. It was true, wasn't it?

A. I think so.

Q. You stated on cross examination on that occasion that a certain card which was described as a summary of a certain leaflet, which was introduced, was posted publicly in your office, did you not?

A. Yes, sir.

Q. And I believe you stated also, but I am not certain as to this, and I do not mean to say so, that you were familiar with the leaflet, a part of which was in that car, issued September 1st, 1910, by the vice-president and general manager of the defendant company. You are familiar with that, are you not?

A. If I made a statement in regard to that, if I did it was to the effect that I had never seen this pamphlet to my recollection.

Q. Then you mean to say now that you never saw the printed rules of the company applicable to the government of employees working on or about the tracks, issued September 1st, 1910, by the vice-president and general manager of the railroad; is that correct?

A. I do not remember ever seeing the pamphlet.

Mr. McCORMICK: You mean by that, this leaflet?

WITNESS: Yes, sir, this leaflet.

Q. I will ask you to examine the leaflet carefully and say definitely, did you or did you not have that in your possession, and whether or not it was in the possession of your men, and distributed among your men?

A. I do not remember that I answered the question before. I do not remember ever seeing this pamphlet. If it was ever in my hands, I do not remember it, and I do not remember distributing it. If I did so, it has slipped my memory. I do not remember it.

Q. It was your duty to distribute it, wasn't it?

A. If it was in my possession.

Q. Please read the title on the top of that pamphlet.

A. "Rules for the Government of Employees Working on or about the Tracks, Norfolk & Western Railway Co."

252 Q. That rule applied to you and your men, didn't it?

A. Yes, sir.

Q. Now, please read rules six, seven and eight in that leaflet and say if the person described in those rules as foremen didn't mean you?

A. Foremen and others in charge, employees working on or about the track.

By Mr. McCORMICK: Read it to yourself; do not read out loud. The rule has already been introduced into the record.

By Mr. WERTH: Just answer my question.

A. Yes, sir, it does refer to me, I suppose.

Q. Then from September 1st, 1910, to this date, you, as Tom Holbrook's foreman, were in absolute ignorance of the rules prepared, adopted, promulgated, printed and issued by the defendant company for the government of its foreman, and adopted especially to promote reasonable safety of the men under those foremen; is not that true?

A. So far as I am concerned, as I have said before, I have no knowledge of seeing, and do not remember seeing the pamphlet, but as far as the rules are concerned, I think I understand those rules and have for years.

Q. But rules six, seven and eight in that pamphlet are something distinct and separate from the rules of the company. I have handed you that pamphlet and you have been asked to read rules six, seven and eight, printed thereon, which you have done, and have said they applied to you as Tom Holbrook's foreman. Why do you call it a pamphlet as distinguished from the rules of the company? Is not paragraph six, seven and eight in that pamphlet a rule of the company, addressed to you as the company's foreman? You seem to speak of that pamphlet, or those rules, six, seven and eight, as a pamphlet and as something distinct and separate from the rules of the company. Now, are they not a rule of the company, and were they not addressed to you as one of the foremen?

A. It was addressed to me as foreman. I wish to make a correction there.

Q. Wait a moment; answer my question first.

Mr. McCORMICK: Let him make his correction; he has got a right to do that.

By the COURT: Yes, Mr. Werth, he has got a right to make the correction right now.

253 A. My answer to a former question perhaps might leave the impression that I have not, up to the present date, seen this pamphlet. I have seen this pamphlet since this case came up.

By the COURT: You haven't answered the question asked you fully. Please read it to the witness.

(Question read.)

Let me put another question first. Do you mean to say by your last answer, saying it was merely addressed to, that it was not a rule of the company; that paragraphs six, seven and eight were not rules of the company?

A. No, sir, I do not mean to say that.

Q. Then I understand you to say that paragraphs six, seven and eight are rules of the company?

A. I suppose they are.

Q. Then in the preceding answer, in which you said that you were familiar with the rules of the company, you were in error in making that statement, were you not?

A. So far as this pamphlet is concerned, this particular rule that is in this form.

Q. Then, looking back to your examination in chief, in which you seem to think and to state that no protection was ever to be afforded the men on *the men* on the bridge as distinguished from the trains, I will ask you, do you know any other rules of the company than paragraphs six, seven and eight made for the protection of the men?

A. I do not know that I can designate any particular rule. We often get circular letters in regard to these kind of things, for the safety of our men as well as our property.

Q. You have read paragraphs six, seven and eight on the leaflet that you have examined, and I will ask you if each one of those paragraphs are not addressed to the foremen, and if each of those paragraphs do not put the duties upon the foremen expressly and on their face intended to protect men at work in dangerous situations on the track from approaching trains?

Question objected to by counsel for defendant because the rules show for themselves, and the rules are in evidence, and also because it is not germane to the examination in chief; but our main objection to the question is, that the rules speak for themselves, and they are subject to construction by the court.

254 By the COURT: I think the latter objection is well taken, that they speak for themselves.

Q. Do I understand your examination in chief to have been to the purport that you never used the specific precaution of a flag, but used other precautions to protect the men. Is that what you mean to say?

A. I do not remember ever using a flag for the protection of the men, but we do use other precautions.

Q. You do use other precautions?

A. Yes, sir.

Q. Whenever circumstances in your judgment make it necessary?

A. Yes, sir.

Q. Please name some of the other precautions?

A. It is the custom of the foreman in charge of men, working in places, for instance, as this particular case, to keep an eye or watch while the men are at work, and when he hears the train approaching

to notify them of the fact and tell them to get into the clear, or get off the bridge, out of the way.

Q. Assuming the foreman to be in a situation where there wouldn't be time enough on account of the curve intervening between the time he could see the train for the men to get out of the way, what sort of a precaution would you use there?

A. In a case like that I would use a flag.

Q. Suppose the watchman that you spoke of is stationed at the end of the bridge and knows, or ought to have known, that a double-header freight train was, or might be, passing him, going up grade and making such a noise as such trains generally make, and when it came out of the tunnel it was a short distance of the end of the bridge, and on the opposite side of the bridge, and that he knew, or should have known, that that train would envelop that bridge in smoke, do you know any rule of the company that provides such a precaution as his mere voice to holler out "Railroad" for the protection of those men on the bridge?

By the COURT: I think I will object to that question myself for the sake of consistency and fairness. Each time that that effort has been made I have sustained the objection to it. That is a question for the jury to answer.

Q. Did you have a whistle to blow in situations where it was necessary to give men warning of approaching trains on the bridge?

A. No, sir.

Q. Did Mr. Carbaugh have a whistle?

A. I don't know whether he did, or not.

255 Q. You didn't know until you saw the rules of the company at this court that a whistle was required, if I understand you?

A. Yes, sir, I think I have seen somewhere something to that effect.

Q. Do you know any other rule published by the railroad company, other than rules six, seven and eight, which you have examined, that requires you to have a whistle?

A. I do not remember just where I saw it, but I saw that somewhere. I don't know where.

Q. Then, if you do not remember any other rule containing such a requirement, and you know you have seen it, then you must have seen rules six, seven and eight; isn't that true?

A. I do not know.

Q. Then you admit that you do know that there was some rule of the company requiring you to have a whistle?

A. Yes, sir.

Q. Can you name any other rule of the company, other than rules six, seven and eight, that have such a requirement?

A. I don't know whether I saw it. I do not remember whether I saw this rule; I would not state positively I never saw it, but that was in my mind.

Q. I will ask you to read the first paragraph of rule seven on the leaflet which you have examined, and tell the jury what precautions you would take under that rule?

By the COURT: Do you mean under the circumstances stated in the rule?

Mr. WERTH: Yes, sir.

A. In that case, in case of fogs, steam, or any obstruction I would have the men clear the track in the case of approaching trains.

Q. If you have read paragraph seven, you will observe that its intent and purpose is to give the men who are working on the track notice of the approaching train; if you would have the men to get off the track, they would not be on there, and they would need no notice. I ask you if that is the only answer you desire to make to that question?

Question objected to by counsel for defendant, as to its form and substance.

Objection overruled.

Defendant excepts.

A. That is a case where trains are passing——

256 By the COURT: I do not believe you understand the question. The last question is in view of the last question and answer that has just been read to you, and Mr. Werth wants to know whether or not, you desire to make any further answer to the question.

Mr. WERTH: I think I can get at it quicker by putting another question and striking that out.

Mr. McCORMICK: I do not think he can strike it out after the question has been put to the witness.

Mr. WERTH: Do you object to it?

Mr. McCORMICK: If you want to strike it out just strike it out.

Mr. WERTH:

Q. A- you will see from the first paragraph of rule seven, its object on its face is to give the men notice of approaching trains, men who are at work on the track. You say that you would have the men clear the track on the approach of trains, but I want to know what you would do under rule seven to ascertain when trains were approaching?

A. We use our ears and our eyes and listen for trains, the sound of trains, the whistle and noise of the train, and also look to see when they are approaching. In a case like he speaks of here, we always have foremen, and it is the custom for the foreman to look out——

Q. Wait a minute.

By Mr. McCORMICK: Let him finish his answer.

By Mr. WERTH: I am objecting to his answer.

By the COURT: He has the right to stop the witness if he is making an improper answer.

By Mr. WERTH: My objection is this; this is the second time he has attempted to leave the rules and discuss the circumstances of this case. I am examining him not as to the circumstances of this case, but as to this rule, and I have a right to confine him to this rule, I think.

Mr. SMITH: He is talking about a case under the rule.

257 Mr. WERTH: I thought he had reference to the case we are trying; I beg your pardon.

Q. I understand your last answer to be that "We would use our ears and our eyes." Is that all you think the first paragraph of rule seven required of a foreman?

Question objected to by counsel for defendant; the rule itself speaks as to what it means, and the court can construe as to what it does mean.

Objection sustained.

Q. You have observed that rule seven applies to the situations in which there are permanent obstructions to the view; that is, of the foremen. Will you tell the jury what good you think a man's eyes would do him where there was a permanent obstruction to his view?

A. It wouldn't do him any good if he couldn't see, no further than he could see.

Q. You referred also to the use of his ears; will you tell the jury how much good his ears would be to him if a double header freight train was going west within three feet of where he was standing?

By the COURT: Mr. Werth, I think that question is argumentative entirely, and the witness can give us no real information as to that.

Q. I will ask you to read rule eight and tell the jury what you would do under that rule and the situation therein referred? First, I will ask you to read rules six, seven and eight to the jury.

(Here the witness reads rules six, seven and eight to the jury, but the stenographer was instructed not to copy them at this point, for the reason that they have already been copied into the record. See p. 256, printed page 165.)

By a JUROR: Why is it that they require a whistle to be blown; is it because they can whistle louder than they can holler? Why is the foreman required to have these whistles?

By the COURT: I think that is a matter for argument of counsel, when they come to argue the case to the jury. I do not think the rule needs any construction by the court in that respect.

258 By Mr. WERTH:

Q. Now, please answer the question I asked you, and that is, what you would do under that rule and the situation therein referred to.

A. I would say that is altogether owing to circumstances. There might be conditions that would require that, and I would, in that case, comply with that rule, or use precaution similar to that, and have done the like.

Q. Now, bearing in mind the noise which was made by the long heavy freight train, and assuming that you want to give a signal which will penetrate and overcome the noise of the freight train,

I will ask you which is the most adequate to do that, the human voice, or a sharp shrill whistle?

Question objected to by counsel for defendant.

Objection overruled.

Defendant excepts.

A. You asked me for an opinion there. I do not believe there is anything better than the human voice to warn a man of danger.

Q. Then you think that the second section of rule seven, adopted by the defendant company, instead of requiring the foremen to provide themselves with a whistle, should have merely required the foreman to provide themselves with a good voice?

A. I never used a whistle, and I never provided myself with a whistle.

Q. There is a good deal of difference in the carrying power of the different human voices, isn't there?

Question objected to by counsel for the defendant.

Objection sustained.

Redirect examination.

By Mr. McCORMICK:

Q. Mr. Anderson, take that rule eight and say whether that has reference to a high and open bridge where there is no clearance for the men, and not a situation such as this?

Question objected to by counsel for plaintiff, because the effect and intent thereof is to limit and restrain the operation of  
259 rules adopted by this company by limitations which do not appear, nor can be inferred from the rule itself.

Objection sustained.

Defendant excepts.

Q. "When working on tracks in places where approaching trains cannot readily be seen, because of permanent obstructions to the view, or temporary obstructions, such for instance as fog, storms, snow, or engines or cars, extra precautions must *must* be taken to warn the men of approaching trains." Do you know of any better way of warning the men than by telling them to get out of the way of approaching trains?

Question objected to by counsel for plaintiff.

Objection sustained.

Defendant excepts.

Mr. McCORMICK: In order to make up the record, I desire the answer of the witness to be put in the record.

By the COURT: Very well, you can retire with the witness and stenographer and have him give his answer.

At this point the witness and stenographer together with counsel for defendant retires to the judge's office, and the witness answers as follows, in the absence of the jury—"No, sir.")

Q. The last paragraph of rule seven provides "Foreman, watchmen, and others, in charge of gangs or squads of workmen, must



provide themselves with a whistle, and should use the same in warning men when working in places where approaching trains cannot be readily seen." If trains can be readily seen or heard is a whistle necessary?

By the COURT: That is argumentative.

Mr. WERTH: It also assumes, as a matter of fact, that this train could be readily seen.

Mr. McCORMICK: In order to make up the record, I desire the record to show that the answer of the witness would be "No, sir."

260 Q. Now, rule eight is as follows: "As an extra precaution, when necessary to place a watchman at some distance from the men at work on the track, or in such location that his signals may not be understood, additional watchmen should be placed so that the signals can be passed to the men at work and return signals obtained. In case returned signals are not received and understood, the watchman must signal the train to stop." Now, supposing that the work being done there that morning was simply the repairing of the guard rail to take the place of the old guard rail which was to be removed, was that such a condition as that rule would apply to?

Question objected to by counsel for plaintiff.

Objection sustained.

Defendant excepts.

By Mr. McCORMICK: In order to make up the record, I desire the answer of the witness to be recorded, which is, "No, sir."

Q. Do these rules, six, seven and eight, apply to anything except to high bridges?

Question objected to by counsel for plaintiff.

Objection sustained.

Defendant excepts.

(Witness stands aside.)

R. L. Porter, for defendant.

Direct examination.

By Mr. SMITH:

Q. What is your name?

A. R. L. Porter.

Q. What is your business?

A. I am working as a laborer with the bridge force.

Q. Where were you working on January 4, 1913, and who under?

A. I was working at Old Pando, W. Va., under Dan Carbaugh.

261 Q. What was the number of that bridge, do you recall?

A. 899-A.

Q. Are you what is known as a bridge carpenter?

A. A bridge laborer.

Q. How long had you been working with that force before that time?

A. I went there in 1910, the last part of 1910.

Q. And you had been working with that force from the last part of 1910 up to the time of the accident?

A. I had.

Q. Mr. Porter, who had charge of the forces on that day?

A. Mr. Carbaugh.

Q. Were you present there at the time of the accident when Mr. Holbrook was killed?

A. I was.

Q. State to the jury now the circumstances connected with that accident, in reference to what trains were passing, and what the men were doing at the time they were notified of the approach of the first train, and what they did after they were notified up to the time of the accident?

A. The first thing we did on the morning of the fourth, we loaded a carload of ties, and we got those ties loaded, we went to the bridge, 899-A, and went to putting on guard rails, and we put on until noon, and went to dinner, and also went back again, and after dinner as we went out Mr. Carbaugh said "Boys, you want to be careful to keep in the clear here, it is a mighty dangerous place." He said, "Keep in the clear of both tracks when there is a train passing either way," which we did.

Q. I asked you to tell what happened when the trains came which were passing at the time of the accident. Go ahead and tell that.

A. Ninety-two was coming up the east bound track, and Mr. Carbaugh said, "Get in the clear, boys; railroad," rather he said, "Ninety-two is coming," and we all got in the clear, and Mr. Holbrook, then he got back on the bridge and passed west; and I also said to him, I said, "Mr. Holbrook, you had better get in the clear, for something might swipe you off."

Q. Well, go ahead.

A. And just in a very short time, why, the man was killed.

Q. No. 92, as I understand, was a freight train coming east on the east bound track?

A. It was.

Q. Where was Mr. Carbaugh when No. 92 first came?

A. He was on the east end of the bridge somewhere.

Q. When No. 92 first came?

A. As well as I remember, he was.

Q. What was done after he hollered railroad, and clear up?

A. They had a piece of guard rail framing; they had a piece of guard rail and was framing it, and they put it in the clear, and they all cleared up then.

262 Q. Did you get in the clear?

A. I did.

Q. Where did you get to?

A. I got down on the floor beam.

Q. About where on the bridge?

A. I do not remember whether it was on the west end or the east end of the second span, but it was right close.

Q. You do not remember whether it was on the west end or on the east end of the second span to the bridge?

A. I do not remember which one it was.

Q. But it was one or the other?

A. Yes, sir.

Q. It was on the second span of the bridge then, that you got in the clear?

A. Yes, sir, I think it was on the second span.

Q. You say you got down on the floor beam, and the flange of the girder?

A. I did.

Q. Where did Mr. Holbrook get?

A. He got down east of me on the floor beam, too.

Q. How far east of you?

A. Thirty or forty feet; I don't know exactly.

Q. Did he get down in the same position in reference to the floor beam and flange that you were in, where you were?

A. He did.

Q. How long after Mr. Carbaugh had said, "Get in the clear" before he got down there?

A. Just a few seconds.

Q. State whether or not he got down in the clear before you did?

A. He did.

Q. Who got down in the clear first, so far as you can tell, of all the men?

A. I suppose he did, as far as I know.

Q. When he had gotten down in the clear, state whether or not there was anything left on the west bound track to interfere with the passage of a train?

A. There was not.

Q. Are you sure of that?

A. I am sure of that.

Mr. WERTH: I think those questions are leading, and I object to them.

Objection overruled.

Q. Did anybody get in the clear near you, Mr. Porter?

A. Mr. Hinkle was with me, he got in the same place, or in the same clearing at the same place I did.

Q. Which Mr. Hinkle?

A. Bill—William, rather.

Q. He is called W. M. Hinkle, isn't he?

A. Yes, sir.

Q. State if you heard any one give any signal of the approach of second fifteen before second fifteen came?

263 Question objected to by counsel for plaintiff, as leading.  
Objection overruled.

A. Yes, sir.

Q. State what it was, and who gave it, if you know?

A. I don't know who it was.

Q. State what it was; what was the signal?

A. Somebody hollered out "Get in the clear; second 15 is coming."

Q. State as well as you can about how long it was after you saw Mr. Holbrook in the clear before he passed you, as you have stated?

A. It hadn't been over a quarter of a minute, anyhow, I would say.

Q. In which direction was he going, west or east, when he passed you?

A. Going west.

Q. Was that in the direction in which the men had been putting down, or working on the guard rail when No. 92 came, or the opposite direction?

Question objected to by counsel for plaintiff, because they have not fixed the point where the guard rail was being framed, and the question is also leading, and they have failed to ask him where they were framing that guard rail.

Objection overruled.

A. The opposite direction.

Q. About what point on the bridge were the men working on the guard rail when No. 92 was announced?

A. Pretty close to the west end of the span.

By the COURT: Which span?

WITNESS: The first span.

By the COURT: The east span?

WITNESS: Yes, sir.

Cross-examination.

By Mr. WERTH:

Q. What time did you go to work on that bridge that morning?

A. About ten o'clock, I guess.

264 Q. How long after you went to work on the bridge before that coal train came along going west on the west bound track?

A. I don't know.

Q. Was it a quarter of an hour, half an hour, or an hour after you went to work?

A. It might have been an hour.

Q. What sort of a train was that coal train; how was it made up?

A. I don't know how it was made up.

Q. Cannot you tell whether the engines were in front or behind it?

A. It was in front.

Q. Cannot you tell whether it was made up of coal cars or box cars?

A. No, sir, I cannot.

Q. Cannot you tell whether it was a double header or one engine?

A. I do not remember whether it was a double header or a single engine.

Q. What were the men doing on the bridge when that coal train blew for the bridge?

A. Putting on a guard rail, I think.

Q. Who was putting on the guard rail?

A. Pierce Walters and two of the Hinkles. One of the Hinkles rather, and another man or two, I don't remember who they were.

Q. Just what do you mean by the words "Putting on the guard rails"? There are several movements and operations in putting on a guard rail, and I would like to know what you mean by these words "putting on a guard rail?"

A. That is, taking up an old piece and reframing a new piece and putting it down in the old piece's position.

Q. That was the general character of the work they were doing on the bridge that morning?

A. Yes, sir.

Q. I didn't ask you the general character of the work they were doing; I asked you what were the men doing at the time the coal train whistled for the bridge; I mean the men that you have mentioned?

A. They were clearing up this guard rail.

Q. Where were they clearing it up at?

A. I said they were clearing it up.

Q. I asked you where were they clearing it at; at what part of the bridge?

A. On the first span.

Q. The east span?

A. Yes, sir.

Q. Just what do you mean by clearing up; do you mean taking it from one place and putting it on another?

A. They were carrying it in on the bridge, and they blew.

Q. That wasn't clearing it up, they were carrying it in on the west bound track, weren't they?

A. Yes, sir.

Q. Four of the men?

A. Yes, sir.

Q. When the train blew?

A. Yes, sir.

Q. How did that train blow when it blew; what sort of a whistle did it blow?

A. I do not remember what sort.

265 Q. Do you know the alarm whistle when you hear it?

A. No, sir.

Q. Do you know the blows, toot, toot, toot, that engineers blow when cattle or when persons are on the track?

A. That means to clear up.

Q. Wasn't that the whistle that was blown by that coal train?

A. I do not remember whether it was, or not.

Q. To the best of your recollection, wasn't that the whistle that engineer blew?

A. To the best of my recollection, I believe it was.

Q. He blew a whole lot of them, just as fast as he could blow, didn't he?

A. He blew two or three times, or something of the kind.

Q. Fast short whistles?

A. Yes, sir, I believe he did.

Q. What did that whistle say to the men on the bridge; please translate that whistle into words?

A. It meant for them to clear.

Q. How close did the train get to the men carrying the guard rail into the bridge and on the bridge before they got clear of the track, how many feet?

A. I would say twenty or thirty feet.

Q. Didn't it get closer than that?

A. No, sir.

Q. Didn't it like to catch these four men with that guard rail?

A. No, sir.

Q. Didn't it like to knock one of the Hinkles into the river?

A. Not as I know of.

Q. When it gave those signals, what did the men with the guard rail do?

A. They laid it on the outside of the old guard rail on the ties.

Q. And that is what you meant just now when you said they were clearing up?

A. Yes, sir.

Q. Did they get it clear?

A. There was something struck it.

Q. Did they get it clear? You are a railroad man, and you know what I mean by clear. Did they get that guard rail clear of that train?

A. Yes, sir, I suppose they did.

Q. Didn't the train strike the guard rail?

A. Something struck it.

Q. Don't you know that the train struck it?

A. Some piece on the door, or car, or something, hit it.

Q. I am not asking you what part of the train struck it, but I am asking you if that train didn't strike that guard rail?

A. It did.

Q. Didn't it knock it some distance?

A. Some six or eight feet.

266 Q. Wasn't that guard rail left in that position because the men did not have time to put it in a proper position?

A. It was not.

Q. Was it left on purpose so it would strike it?

A. No, sir, it was in the clear.

Q. It was in the clear notwithstanding the fact that the train struck it, is that right?

A. Something struck it.

Q. Bill Hinkle is the man that laid that guard rail down there, isn't he?

A. He was one of them.

Q. Wasn't he the last man that left it and jumped to the east bound track?

A. I don't know.

Q. Didn't all those men that had that guard rail jump for the east bound track?

A. I don't know whether they did, or not.

Q. Don't you know where they went?

A. They got in the clear, but I don't know whether they went on the east bound track, or not.

Q. You have been telling us what they were doing. Now, didn't you see them when they cleared? You just stated that the train came within twenty feet of striking them, and unless you saw them, how could you tell that? How could you tell that the train came within twenty feet of striking them unless you saw them?

(No response.)

Q. You cannot answer that question, then. Now, I will ask you if you saw the train within twenty feet of them, why don't you know where they went to?

Mr. McCORMICK: Twenty or thirty feet is his answer.

Mr. WERTH: I am using the one that suits my purpose best.

Q. Why is it that you don't know where they went, or whether they went to the east bound track or not?

A. I never paid any attention to where they went.

Q. Why, if you are able to tell how near the train came to them?

A. I suppose they went over there.

Q. Didn't you see them, and don't you know they went to the east bound track?

A. No, sir, I do not know.

Q. Suppose there had been a train going east on that east bound track at that particular time, they couldn't have gone there, could they?

Question objected to by counsel for defendant.

Objection sustained.

267 Q. How long was that before Tom Holbrook was killed, or about?

A. An hour or so.

Q. Had regular 15 passed that morning going west on the west bound track before that coal train went on the bridge?

A. Yes, sir, I believe it had.

Q. Did it carry any signals for a second section?

A. Yes, sir.

Q. You know what those signals are?

A. I knew something was following.

Q. They were signals to the foreman, is that correct, and it was the foreman's duty, and he was required by the rules of the company to see those signals, and watch that train to see if it had any signals, was he not?

A. I suppose he is.



Q. Don't you know that? Don't you know the rules of the company require that foreman should watch that train for signals?

A. I do.

Q. And that train carried signals indicating that it was to be followed by another train?

A. It did.

Q. Did Mr. Carbaugh have any time on that other train?

A. No, sir, not as I know of.

Q. Therefore it would be expected at any minute; is that right?

A. It was.

Q. It was to be expected at any minute then?

A. Yes, sir.

Q. And when it came it was a fast through passenger train, wasn't it?

A. It was.

Q. How fast does No. 15 generally run along there, between Welch and Williamson, or between Welch and Davy?

Question objected to by counsel for defendant. The question is how fast it was running along there at that time.

By the COURT: No, sir, he has got a right to know how it generally runs.

A. Thirty to thirty-five miles, I suppose.

Q. How fast was it running that morning?

A. Something like that.

Q. How fast was the second section running when it came along?

A. I suppose it was coming about the same time.

Q. It was going then at its usual rate of speed?

A. Yes, sir.

Q. At its usual and regular speed?

A. Yes, sir.

Q. What did the schedule permit them to go at?

Mr. McCORMICK: The schedule is the best evidence of that, and he has called for the production of it, and I hardly think  
268 that question is proper. It has already been shown that the schedule permits them to go forty miles an hour and nobody disputes that.

Mr. WERTH: Then it is admitted in this case that the schedule permitted that train to go forty miles an hour.

Q. You say it was going something like thirty to thirty-five miles an hour?

A. I did.

Q. Are you giving that to the jury as your opinion of the speed of that particular train on that occasion, or as the usual speed of that particular train?

A. I am.

Q. Which?

A. Yes.

By the COURT: When you say thirty or thirty-five miles an hour, is it your opinion that second No. 15 on that particular day was run-

ning at that speed, or do you mean that it was at the speed No. 15 generally runs?

WITNESS: The way it generally runs.

Q. Then, I understand you to say that No. 15 generally exceeds thirty-five miles an hour; is that right?

A. First fifteen?

Q. No. 15. Don't you know that there is no difference in the schedule of a train and the second section running as that train? Answer that question. Don't you know that there is no difference in the speed of a train and a second section following that train?

A. I suppose they were making that all right.

Q. I understand you to say in that last answer that you suppose both sections of No. 15 on January fourth were making thirty-five miles an hour all right, is that right?

By Mr. SMITH: He said from thirty to thirty-five miles an hour. Why do you say thirty-five?

By the COURT: I think he has a right to put it that way.

Q. Please read the question again. (Question read.)

A. Yes, sir.

Q. Are you fixing that amount as the lowest or highest speed in your opinion?

A. The highest, I think.

Q. Then when you used the words "All right," making thirty-five miles all right, you really did not intend to use that word, did you?

A. Use what word?

269 Q. "All right." That would seem to indicate that you put it at thirty-five miles at the lowest. Mr. Porter, I will ask you to tell that jury if you do not believe that train, the second section of No. 15, was making from thirty-five to forty-five miles an hour on that day?

A. I believe it was making from thirty to thirty-five miles an hour.

Q. Of course it would be making from thirty to thirty-five miles an hour, though it might have been going fifty miles an hour. But I am asking you to answer the question that I put to you and say whether it was going from thirty-five to forty-five miles an hour?

Question objected to by counsel for defendant.

Objection overruled.

Defendant excepts.

A. I do not.

Q. The question is whether it was going from thirty five to forty-five. Do you believe that train may have been making forty miles an hour?

A. I do not.

Q. Where were they framing the timber on the bridge that day with reference to the middle of the bridge?

A. They were framing it on the bridge. I do not remember whether it was on the middle, or not.

Q. Can't you give me an idea as to whether it was near the middle of the bridge, or not?

A. I don't know.

Q. I know you don't know the exact spot, not having measured it on that day while the timbers were on the bridge, but I asked you for your opinion, and I ask you to tell the jury whether it was not near the middle of the bridge?

A. Something near the middle, I suppose.

Q. How far west of the end of the east span was it?

A. Thirty feet, I would say.

Q. How long are those spans?

A. About seventy feet, I think.

Q. Don't you know they are seventy-five by actual measurement?

A. I don't know exactly what they are.

Q. Don't you know that all the spans on similar bridges are of uniform length, and that they are seventy-five feet long?

A. Some are and some aint.

Q. Then if that span was seventy feet, which you state it to be in your opinion, and they were framing timber thirty feet west of the west end of that span, they were framing it one hundred feet from the east end of the span, weren't they?

A. I don't know.

270 Q. You have just stated that they were framing it about thirty feet west of the west end of the east span and that the east span was about seventy feet long. Now, can you answer the question I put to you, which was, if that wouldn't have been a hundred feet from the east end of the bridge.

By Mr. McCORMICK: That is a matter of calculation, and we object to the question.

By the COURT: But he is cross-examining the witness and the objection will be overruled.

A. No, I think not.

Q. Is the east end of the bridge west of the east end of that span?

Defendant objects.

Overruled.

Defendant excepts.

A. No, sir.

Q. The east end of the bridge is at the east end of that span, isn't it?

A. Yes, sir.

Q. Then, if the span is seventy feet long and they were framing this timber thirty feet west of the west end of the span, I am asking you if they were not framing those timbers one hundred feet from the east end of that bridge?

Objection by defendant.

Overruled.

Defendant excepts.

A. No, sir, they were not.

Q. Will you explain that answer to the jury; or what you mean by it? Where were they? How near to the east end of the bridge were they framing it?

A. Something near the center of the bridge.

Q. How near to the east end would something near the center of the bridge be?

A. Thirty or thirty-five feet, I suppose.

Q. Then the center of the bridge would be within thirty or thirty-five feet, would you say, of the east end of the bridge?

A. Yes, sir.

271 Q. Then the bridge would only be seventy-five feet long, is that right?

A. Seventy or seventy-five feet, I don't know exactly how long it is.

Q. It is admitted in this case by counsel on both sides that the bridge is two hundred and twenty-eight feet long.

A. I mean one span of it, the first span.

Q. So you think then that the bridge is not that goes to make the bridge, but just one span of the bridge. I have repeatedly asked you how far that framing was done from the east end of the bridge, and in each instance I have used the word bridge and not span. Did you think I was talking about one of the three spans of that bridge?

A. I did.

Q. Then, tell me please, how far they were framing that timber from the east end of the bridge, meaning to include in the word "bridge" all three spans that made up the bridge?

A. They were on the first span about the middle of the bridge, as well as I remember.

Q. Just now you told the jury they were framing it thirty feet west of the west end of the first span; now, which is correct?

A. The last one.

Q. Then they were framing it about the end of the west end of the first span of the bridge; is that right?

A. Along in the center of it, of the front span.

Q. Now, you said the span was seventy-five feet long, didn't you?

A. I did.

Q. Then they were framing it then thirty-five feet of the east end of the bridge according to your statement now; is that correct?

A. Yes, sir.

Q. Then, what did you mean when you told counsel on your examination in chief that the framing was done pretty close to the west end of the east span of the bridge. Didn't you make that statement, and use the words "pretty close to the west end of the east span of the bridge?"

A. I did, I suppose.

Q. Then how can you reconcile that statement with the statement you made a little while ago on cross-examination that it was framed thirty feet west of the east span of the bridge? How can you reconcile those two statements?

A. I don't know.

Q. I will ask you if it is not a fact that you did not make those conflicting statements until it appeared to you that thirty and seventy made one hundred and that you were putting that framing one hundred feet from the east end of the bridge?

A. I was understanding you to speak of the first span.

Q. How could you understand me to be speaking of the first span, when your answer was that the framing was done thirty feet west of the west end of the first span? How would that be possible?

(No answer.)

By the COURT: Answer the question.

A. Yes, sir.

Q. Yes, sir, does not answer that question. Will you please answer it?

A. Explain the question again.

Q. Read the question.

(Question read to witness.)

(No answer.)

Q. Thirty feet of the west end of the first span would have been near the middle of the middle span if that span was seventy feet long, wouldn't it?

A. I don't know.

Q. You said just a moment ago that the span was seventy feet long, didn't you, or about seventy feet long?

A. I did.

Q. If that framing was done within thirty feet of the end of the span it would be within two and half feet of the middle of that span, wouldn't it?

A. Yes, sir.

Q. Then if the first span of that bridge was seventy feet long and the framing was done thirty feet west of the west end of that span, it would be thirty feet plus seventy wouldn't it?

A. It would.

Q. That would be one hundred feet, wouldn't it?

A. Yes, sir.

Q. That would be one hundred feet from the east end of that bridge, wouldn't it?

A. It would.

Q. Then that framing could not have been done in thirty or thirty-five feet of the east end of the bridge, could it, if you are correct in your other answer?

A. No, sir.

Q. Then you are wrong when you told the jury the framing was done within thirty-five feet of the east end of that bridge, weren't you?

A. No, sir, I think not.

Q. Mr. Porter, how old are you?

A. Thirty-two.

Q. At the time that Dan Carbaugh hollered clear up for 92 nobody had heard or seen anything of second fifteen, had they?

A. Not as I know of.

Q. At the time that you heard somebody say "Get in the clear for second 15," which was coming, you, yourself, had not heard or seen anything of second fifteen, had you?

A. I had not.

Q. You had neither seen nor heard anything of second 15 at the time you heard somebody say "Get in the clear for second 15," is that right?

A. Yes, sir.

Q. You were in the clear at that time, and so was Tom Holbrook, according to your statement, in obedience to the order to clear for 92; that is right, isn't it?

273 A. I was in the clear for both tracks.

Q. As a physical fact you were clearing both tracks; the east bound track by some eight to ten feet, and the west bound track by some three feet, but I am asking you if it is not a fact that you got in the clear for 92?

A. I got in the clear for 15.

Q. At the time you got in the clear you had not seen or heard anything of 15, had you?

A. I had not.

Q. At the time you got in the clear nobody on that bridge had — or heard anything of fifteen, had they?

A. They hadn't seen it; I don't know whether they heard it, or not. I had not.

Q. I am talking about you.

A. I had not.

Q. And so far as you know nobody else heard it, had they?

A. No, sir.

Q. At the time that you went into the clear, you went immediately after Carbaugh told you to clear for 92, didn't you? That is right, isn't it.

A. He said "Clear boys for both tracks," and we just got in the clear.

Q. He said that for 92, didn't he?

A. Yes, sir.

Q. It was proper, usual and customary thing to clear both tracks though the train was passing on the other track, wasn't it?

A. Yes, sir, it was.

Q. How thick was the smoke on that bridge at the time you got in the clear?

A. Pretty thick.

Q. What do you mean by pretty thick? Could a man see another some distance away from him on the bridge?

A. He couldn't see a great ways, no, sir.

Q. How far could he see?

A. Thirty or forty feet, I suppose.

Q. You think he could see forty feet in that smoke?

A. I do.

Q. How thick was the smoke?

A. I don't know how thick it was, but pretty thick.

Q. Was it thicker than usual? Wasn't it thicker than usual?

A. It was thicker than it had been the day before.

Q. Didn't it usually envelop that bridge so densely that men could not see each other who were on the bridge?

A. No, sir.

Q. You say you heard somebody say "Get in the clear for second 15 is coming," after you had gotten in the clear? Was that the signal you heard there with reference to 15?

A. No, sir.

Q. It was the only one that you mentioned to the jury, wasn't it, when you were examined in chief. Did you mention any other signal whatever?

A. I heard Mr. Carbaugh—

274 Q. That is not the question. Please answer the question I put to you. Did you tell the jury on your examination in chief of any other signal, when you were asked by counsel for defendant if you heard any signals for 15, did you mention it at any time during your examination in chief about any other signal except the words you heard somebody say, "Get in the clear, for second 15 is coming?"

A. Yes, sir, I heard Carbaugh—

By the COURT: He is not asking you that. He is asking you what you said to the jury when Mr. Smith was examining you. Did you mention hearing any other signal when Mr. Smith was examining you?

WITNESS: I do not understand the question.

By the COURT: Did you tell the jury of having heard more than one signal for second fifteen while Mr. Smith was examining you?

WITNESS: I did, I think.

Q. What other signal did you tell the jury about while Mr. Smith over there was examining you?

A. Carbaugh said—

Q. I am not asking you anything about Mr. Carbaugh. Read the question. (Question is read.)

A. I do not remember now what it was.

Q. At the time that you heard somebody holler "Get in the clear for Second 15," that freight train was still on the bridge, wasn't it?

A. It was.

Q. That was a long double header train, wasn't it?

A. I don't know whether it was a double header, or not.

Q. Do you know whether it was long, or not?

A. Yes, sir, it was a tolerably long train.

Q. How long would you say it was? Express in fractions of a mile. How long would you say it was; give us some idea either by the number of cars, or otherwise?

A. I would say about fifty or sixty cars, or something like that.

Q. How much of the train was on the bridge at that time, at the time referred to in the last question that I put to you?

A. Just mighty little of it.

Q. How much of that train was going up grade—I mean, was that train going up grade?

A. It was.

Q. Second 15 was going down grade, wasn't it?

A. Yes, sir.

275 Q. You said, "Mighty little of that train was on that bridge at that time.



A. At the time 15 passed, it was.

Q. I am not asking about the time 15 passed. I understand that they cleared the bridge about the same time?

A. They did.

Q. I am asking you whether the signal was given by some man to get in the clear, 15 is coming?

A. There wasn't any of the freight train on the bridge then.

Q. All of it was off the east bound track when that signal was given?

A. It was not on the bridge when the signal was given to get in the clear.

Q. And you say that the passenger train and the freight train cleared the east and west end of the bridge at the same time?

A. Both cleared about the same time.

Q. And, yet, when the signal was given to get in the clear, No. 15 is coming, the freight train was entirely off the bridge; is that right?

Mr. SMITH: He didn't say that.

Mr. WERTH: I object.

By the COURT: I think he did.

A. I did not mean to say that.

Q. Didn't you say a moment ago that at the time the signal was given to get in the clear, for fifteen is coming, the freight train was entirely off the bridge?

A. No. 92, the biggest part of it was off the bridge.

Q. No. 92 is what I am talking about. You first said that mighty little of it was on the bridge. I asked you if you did not also say that somebody hollered, "Get in the clear; fifteen is coming," and that at that time No. 92 had gotten off the bridge entirely. Didn't you say that, and is that correct?

A. It is not correct. They both cleared about the same time.

Q. Then you didn't mean to say a little while ago that the freight train hadn't gotten entirely off the bridge when the signal was given for No. 15. You didn't mean to say that?

A. No, sir.

Q. How much of the freight train was on that bridge when that signal — given? I am not talking about when 15 passed, but when the signal was given, how much of that freight train was on the bridge?

A. When the signal was given to get in the clear?

276 Q. When the signal was given. You testified in chief that you heard somebody say "Get in the clear, second fifteen is coming." When you heard that signal, standing on the flange of the girder, how much of freight train No. 92 was on the east bound track and was on the bridge?

A. As well as I remember, there wasn't very much of it.

Q. I don't know what you mean *my* "not very much of it."

A. A. Just a few cars.

Q. I don't know what you mean by a few cars; can you give me an idea by the number of the cars, or what part of the train, whether one-half, or one-third or one-fourth?

A. Probably one-third of it.

Q. One-third of that train was on the bridge at the time you heard that signal, and that one-third, or whatever part of it was on there, was on the east end of the bridge, is that right?

Mr. SMITH: How could one-third of the train be on the east end of the bridge?

Mr. WERTH: I guess you are right about that; I will withdraw the question.

Q. The one-third of the train which you think was on the bridge was on that part of it which the one-third would occupy, west of the east end of the bridge.

By the COURT: I think that is self-evident. I think the jury can locate it now.

Q. What girder were you on when you stood there in the clear?

A. I don't know.

Q. What span were you on?

A. The first span going west.

Q. I do not know what you mean by that answer, whether you are counting the span from the east end of the bridge or not, were you on the first span or the third span?

A. I was on the first span.

Q. Then you were on the first span from the east end of the bridge; is that right?

A. It was the first span from the east end, going west.

Q. What has "Going West" to do with that answer, or with my question? I asked you if you were on the first span from the east end of the bridge. Can not you answer that question yes, or no?

A. The first span.

Q. Going east from the east end of the bridge, is that what you mean?

A. I was on the first span somewhere near the center of  
277 the first span going west, about near the center.

Q. Going west from where, the west end of the bridge or east end of the bridge?

A. The east end of the bridge.

Q. Then, if I understand you, you were about the center of the first span going from the east end of the bridge, is that right?

A. Yes, sir.

Q. Then you were about thirty-five feet from the east end of the bridge, is that right?

A. Yes, sir.

Q. Had the freight train passed you on the opposite track, passed where you were at the time you heard the signal to get out of the way for second fifteen?

A. I do not remember whether it had or not.

Q. How long is a box car?

A. Some of them is thirty feet.

Q. How long is a caboose?

A. I don't know.

Q. Now, will you tell me how many cars were opposite you on the east bound track at the time you heard the signal for second 15; how many cars of No. 92 were west of your position on the opposite side of the bridge at the time you heard the signal for second 15?

A. I do not know.

Q. Can you give me any idea whatever?

A. Probably fifteen or twenty, somewhere along there, I don't know just exactly how many.

Q. A box car is thirty feet long and a freight car is thirty feet long, and some of them are thirty-six feet long, are they not?

A. Yes, sir.

Q. The shortest are thirty feet, are they not?

A. I don't know.

Q. If there were twenty freight cars of No. 92 on the track at that time, how far would they have extended west of that bridge—over six hundred feet, wouldn't they?

A. I don't know.

Q. You just said that the shortest box car is thirty feet long, and you said fifteen or twenty were yet on the bridge at the time you heard that signal; why do you say you don't know? Suppose there were fifteen there, taking the lowest number that you have given, and take the shortest car that is made there, there would be four hundred and fifty feet of that train west of your position. Isn't that true, at the time you heard the signal?

A. I suppose it would be.

Q. If there were fifteen or twenty cars on that bridge, going up grade, pulled by two engines, and thirty to forty off the bridge and east of it, pulled by two engines, it would be making considerable noise, wouldn't it?

A. Yes, sir, it would be making some noise.

278 Q. I asked you if it would be making considerable noise, and you say it was making some noise. A baby carriage will make some noise. Now, I want you to answer my question like I put it, won't you please?

A. Yes, sir.

Q. I did not ask you if it was making a noise. I repeat to you again, a baby carriage will make some noise. Will you answer my question, or do you refuse to do so?

A. Read it over again.

Q. Please read the question. (Question read.)

A. It was making a noise all right.

Q. What is the difference in the noise that a train makes going over a bridge and going over solid ground; when does it make most noise?

A. Over the bridge, I suppose.

Q. And fifteen or twenty of those cars were going over this bridge. Now, will you tell the jury whether that train wasn't thundering by there and making a great noise?

A. It was making a noise at the time it went over the bridge.

Q. It was a time freight, wasn't it?

A. Yes, sir.

Q. And time freights go fast, don't they?

A. They do.

Q. When a train is going fast, if it is a freight train, would the cars coupled together, as freight trains are coupled, they make a greater noise than when they go slower, don't they?

A. I don't know.

Q. Now, Mr. Porter, I have asked you some six or seven times to tell the jury if that train was making a great noise, or a considerable noise when it was going by, and in every single answer that you have made to me, you have confined your answer to saying it was making a noise, which all of us know it does make. Is that all the answer you desire to give me in this case, on that point?

A. It is.

Q. When you were sworn in this case, did you observe the oath that was given you, to tell the truth, the whole truth, and nothing but the truth, so help you God?

A. I did.

Q. Have you done that?

A. As far as I know, I have.

Q. Then, have you given me truthful answers to the last four or five questions I have asked you about the noise that train made, and the whole truth and nothing but the truth?

A. I have.

Q. That morning, when you first went on the bridge, you said Mr. Carbaugh told the boys that that place was a mighty dangerous place; he told them that, didn't he?

A. He told them it was a dangerous place to work.

Q. He said it was a mighty dangerous place, didn't he?

A. Yes.

Q. Did he tell them why it was a dangerous place, or  
279 point out or refer to anything that made it a dangerous place to work? Did speak of the tunnel there?

A. I don't know exactly what he said.

Q. But you are certain that he said it was a mighty dangerous place to work?

A. He said it was a dangerous.

Q. You are certain of that; there is no doubt about it, that he said that, is there?

A. No, sir.

Q. When Tom Holbrook passed you, where you were standing in the clear, you say he was going west; is that right?

A. Yes, sir.

Q. You say you were standing at a point in the first span of the bridge about the middle of the first span. You said that also, didn't you?

A. Something near it.

Q. You also said that when Holbrook was going west, he was going away from where they framed those timbers, didn't you?

A. I did.

Q. If they framed the timbers thirty feet from the west end of the first span, he was going in the very direction of it, wasn't he?

A. He was going opposite from the first span, where they framed the timbers.

Q. I want you to assume the truth of your own state-ent made some time ago to this jury, that the framing was done thirty feet of the west end of the first span of the bridge, and I want to know in that event if he would not have been going in that direction when he passed you, in the direction of where they framed the timber, or where that framing was done.

(No answer.)

Q. Are you unwilling to answer that question, or do you refuse to answer it?

Mr. McCORMICK: Can not you give him time to answer it?

Mr. WERTH: I think I have.

Mr. McCORMICK: The witness does not evidently think so.

Mr. WERTH: He has been thinking that ever since I have been cross-examining him.

A. What is the question?

Q. Please read the question to the witness. (Question read.)

A. No, sir.

Q. I will ask you to suppose that the framing was done about the middle of the bridge, and that you, when you were  
280 standing in the clear, were within about thirty feet of the east end of the bridge, as you have stated; then, in that event, would not Tom Holbrook, when he passed you have been going in the direction of where that framing was done?

A. He would not.

Q. Have you observed that in the question I put to you, I asked you to suppose, and it is not for you to state, but just suppose that that framing was done about the middle of the bridge, and that you were standing where you said you were standing, within about thirty feet of the east end of the bridge, and that Holbrook passed you going west. Now, was he not then in that event going towards where the framing had been done? Now, do you understand that question?

A. I do not.

Q. When Holbrook got in the clear, as you say he did, did he get in the clear east or west of you?

A. East of me.

Q. How far east of you?

A. May be thirty or forty feet, somewhere along there; I don't know exactly how far.

Q. Well, was it thirty or forty? You said in your examination in chief thirty or forty, is that right?

A. It is.

Q. Then you stated on examination in chief, and now you reiterate that Holbrook got in the clear thirty or forty feet east of you; that is right, is it?

A. Yes, sir.

Q. And you were in the clear about thirty feet of the east end of the bridge, is that right?

A. No, sir.

Q. According to that, Holbrook had cleared the bridge and went off of the east end of the bridge, is that right?

A. No, sir.

Q. Well, can you tell me which is right? You have stated and reiterated that he cleared the bridge thirty or forty feet east of where you cleared it, and that you cleared it about thirty feet of the east end of the bridge. Now, can you reconcile your statements on this question?

A. I still do not understand the question.

Q. If you were within thirty feet of the east end of the bridge, and the timbers were framed about the middle of the bridge, how far would you be from where those timbers were framed?

A. On the first span there is where I was. I would not be very far.

Q. How much would thirty from a hundred be? Take thirty from a hundred feet, how much would it leave?

A. Seventy.

Q. Then you would have been seventy feet from the place where those timbers were framed, wouldn't you?

A. No, sir, I wouldn't.

281 Q. You have said you were within thirty feet of the east end of the bridge, haven't you, when you were in the clear? Haven't you made that statement over and over and over again?

A. I may have.

Q. Don't you know that you have?

A. I do not.

Q. You do not what?

A. Know that I have.

Q. Do you know that you have not; will you say that you have, or have not? Which will you say, either?

A. I have.

Q. Then, I understand you now to state that you have stated repeatedly that you went into the clear within about thirty feet of the east end of the bridge. Now, that having been admitted, I want you to suppose that the framing was done at the middle of the bridge, and I want to ask you how far you would have been from that framing or where it was done

A. Not over twenty feet, I do not suppose, from where I was to the framing.

Q. If you add twenty feet to thirty it would be fifty feet, and if fifty feet would be the middle of the bridge, the bridge would only be one hundred feet long, is that true?

A. No, sir.

Q. Why isn't it true?

A. Because the whole bridge altogether is longer than that.

Q. It is admitted in this case that that bridge was two hundred and twenty-eight feet long. One-half of it would be one hundred and fourteen feet, wouldn't it?

A. No, sir, about seventy-five foot to the span, seventy to seventy-five.

Q. It is admitted in this case that that bridge, including the

three spans, is 228 feet long; where would be the middle of that bridge assuming it to be in fact 228 feet long?

A. One hundred and fourteen feet.

Q. Then if the framing was done about the middle of the bridge, it would be 114 feet, or about that, from either end of the bridge, wouldn't it?

A. No, sir.

Q. When the train came out of the tunnel, going east on the east bound track and brought smoke out on the bridge, did the smoke come from the east end or west end of the bridge?

A. It came through the tunnel.

Q. You mean by that, it came out of the tunnel?

A. Yes, sir.

Q. The smoke would then roll forward from the west over the bridge, wouldn't it?

A. East over the bridge.

Q. I asked you if the freight train pulled the smoke out of the tunnel, and that smoke was, as has been referred to, settling down over the bridge, I ask you if it would not roll forward from  
282 the west over the bridge, traveling east?

A. No, sir.

Q. Which way would it go; would it go west?

A. It would come east.

Q. That is what I am asking you. It would come from the west and would roll towards the east; is that right?

(No answer.)

Q. Which way would the smoke travel when the freight train pulled it out of the tunnel, in order to envelop that bridge, east or west?

A. It would travel east.

Q. Then the bridge towards the west would be enveloped in smoke much quicker than the bridge at the east end, is that right?

A. I don't know.

Q. Why don't you know that? You have just stated an instant ago that the smoke traveled east, came out of the tunnel and traveled east, why don't you know which end of the bridge it would envelop first?

A. I don't know.

Q. How would the smoke get to the east end of the bridge unless it first enveloped the west end of the bridge?

A. I don't know how.

Q. Would the smoke that came out of that tunnel get to the middle of the bridge before it got to you, if you were in the clear within thirty feet of the east end of the bridge; do you know that?

A. What is the question?

Q. Read the question. (Question read.)

A. It would, I suppose.

Q. Now, if the framing of these guard rails was done about the middle of the bridge, smoke would get to that place before it got to you, wouldn't it?

A. Yes, sir.



Q. The smoke would be much denser and much thicker at that point, and all of the bridge west of that point, than it would be at the point within thirty feet of the east end of that bridge, wouldn't it?

A. I don't know.

Q. Why don't you know that? If you admit the smoke came out of the tunnel and traveled east, came from the west and went east, why don't you know it?

A. I just don't; I don't know why.

Q. If the timbers were framed about the middle of the bridge, and you were within thirty feet of the east end of the bridge, you would have been in the neighborhood of seventy or seventy-five feet from where those timbers were framed, wouldn't you?

A. I would not.

Q. Why wouldn't you? Wouldn't you have been seventy-four feet?

A. I don't know.

Q. Grant that the timbers were in fact framed about the middle of the bridge, and grant that the bridge is 228 feet long, and admit that you told the truth when you said you were thirty feet of the east end of the bridge, would not that place you seventy-four feet from the place where these timbers were framed?

A. I don't know.

Q. When these timbers were framed, how did they go about framing them; I mean by that, how many timbers were used in framing them?

A. How many pieces you mean?

Q. Yes, sir.

A. Three pieces.

Q. Explain to the jury where those three pieces were put?

A. There on the rail, two of them, and the guard rail on top of the other two.

Q. How big were the pieces of timber?

A. The guard rail was six by eight.

Q. And how long?

A. Eighteen to twenty feet; twenty feet, I suppose.

Q. Now, the other timber, what was their size?

A. The same thing.

Q. Where were they put?

A. They were short pieces.

Q. Where were they put for the purposes of framing the guard rail?

A. Put across the rail.

Q. Of what track?

A. The west bound track.

Q. How far apart were the two pieces put, the short pieces across the track?

A. Ten or twelve feet, I suppose.

Q. And the guard rail was on top?

A. Yes, sir.

Q. How many minutes, or what time, in minutes or seconds intervened between the time that Carbaugh told the men to clear for 92 and the time that you heard somebody say clear for second 15, what interval was there in between that; how much time, as near as you can tell?

A. A minute, or so.

Q. When Mr. Carbaugh gave the order to clear for No. 92, where was 92?

A. Coming in the tunnel.

Q. Coming out of the tunnel?

A. Coming in the tunnel, or in the tunnel somewhere.

Q. You mean the train was in the tunnel and had not come out on the bridge?

A. It had not.

Q. At the time that 15 passed, the two trains cleared the bridge about the same time, did they not?

A. Yes, sir.

Q. When the freight train cleared the bridge on the east end, how far had it pulled the smoke out of the tunnel towards the east end?

A. I don't know.

Q. Why don't you know?

A. I wasn't paying any attention to it.

Q. Was the smoke around you, and were you enveloped in smoke, where you were in the clear?

284 A. To a certain extent there was some smoke.

Q. The smoke had gotten nearly to the east end of the bridge then, is that right?

A. Yes, sir.

Q. How much were you enveloped in smoke? I mean by that, could you look through that smoke; looking east and see a man ten feet, twenty feet, or thirty feet away from you?

A. I wasn't looking east; I don't know.

Q. You were not looking east; why were you not looking east; what was the reason for your not looking east?

A. I was in the clear there, back down against the floor beam, standing there.

Q. Because you were in the clear, and on a floor beam, was that any reason why you should not look east or west.

A. No, sir.

Q. That is the only reason you have to give when I ask you the question why you didn't look east, if there is any other reason, please give that?

A. I haven't any.

Q. You didn't look east simply because you were in the clear. Judging from the smoke that was around you at that point, could you have seen second 15 if you had looked east, could you have seen it coming?

A. I don't know whether I could, or not.

Q. I asked you to judge by the smoke—there is not a man on

that jury that saw that smoke, you did see it—now, tell the jury could you have seen second 15 if you had looked east.

A. Yes, sir, I suppose I could.

Q. You were within thirty feet of the east end of the bridge?

A. Yes, sir.

Q. When was the first time that you saw second 15?

A. It was right opposite me when I first saw it.

Q. You never saw second fifteen until the pilot was dashing by you; is that right?

A. Something near.

Q. How long was that before you had heard somebody say "Clear for second 15?" How long was that after that?

A. I do not understand your question.

Q. You do not understand the question? Read it to him.  
(Question read to witness.)

A. It hadn't been but just a short time.

Q. A short time means many and various different times. I don't know what you mean by a short time.

By the COURT: Just your honest recollection, the best you can recall it.

A. A minute, or so.

285 Q. Do you realize when you use the words "A minute, or so," how long that is? Do you mean a minute, or so, or do you mean a second, or so?

A. A couple of minutes, or something like that, a minute, or so.

Q. You insist that it was a couple of minutes, is that right?

A. Yes, sir.

Q. Did you hear second 15 before its pilot dashed by you?

A. I heard the sound of a couple of whistles.

Q. And notwithstanding that fact you never looked east?

A. No, sir.

Q. And you heard the whistle, and yet you never looked east, is that right?

A. Yes, sir, that is right.

Q. What was fastening your eyes on the west?

A. There wasn't anything particular.

Q. Then why was it that you wouldn't even look east when you heard the train blowing and whistling in the east?

A. I don't know why.

Q. You can't tell why, can you?

A. No, sir.

(Court takes a recess to 2:00 P. M.)

By the COURT: The jury having retired, the court now instructs the witness that he must not talk to any one about this case, and he is not to permit any one to talk to him about this case during the adjournment of court; and if any one attempts to talk to him about the case, he is to report the fact to the court.

WEDNESDAY, June Twenty-fifth, 1913—(2:00 p. m.)

R. L. PORTER still on the witness stand.

Continuation of cross-examination.

By Mr. WERTH:

Q. I was asking you when court adjourned about how it was that you continually looked to the west and would not even turn your head when you heard the train whistling in the east, approaching on the track next to you. Can you give me any other answer now than you gave me before dinner?

A. No, sir.

Q. You don't know why you did it?

A. No, sir.

286 Mr. McCORMICK: What difference does it make whether he looked to the east or to the west if there was no duty on him to look in either direction?

By the COURT: I think he has a right to ask that question.

Q. You said that if you had looked to the east that you think you could have seen No. 15 coming; is that right?

A. Yes, sir, I suppose I could.

Q. There wasn't as much smoke to the east as there was to the west of you, was there?

A. No, sir.

Q. There was a whole lot more smoke west of you on that bridge than there was east of you, wasn't there?

A. Yes, sir.

Q. The smoke was dense and thick over the bridge, and on the bridge west of you, wasn't it?

A. It was.

Q. Then, will you tell this jury how you are able to say positively and emphatically that that track west of you, seventy-four feet west of you, was clear and that there was no obstruction on it?

A. How is the question?

Q. Read the question. (Question read to witness.)

A. It was clear of timber.

Q. How do you know it was clear of timber if the smoke was dense and thick, and enveloped that bridge west of you, how do you know it was clear of timber, and at that, a piece of timber only six by eight and five feet long?

A. Because the boys cleared it up.

Q. Then your answer that the track was clear at the time that this train passed along was based, not on any observation that you made of the track just prior to the time that fifteen came, but it was based on your previous knowledge that the track had been cleared, is that right?

A. Yes, sir.

Q. Which of the boys had cleared it up?

A. Walters, I believe, and the two of the Hinkins and—

Q. Who else, you started to name another man?

A. Mr. Holbrook helped to clear it up.

Q. When they cleared it up, where were you?

A. I was getting down on the floor beam.

Q. You were getting in the clear?

A. Yes, sir.

Q. At the time they were clearing it up and you were getting in the clear seventy-four feet away from them; is that right?

A. No, sir, it was not seventy-four feet.

Q. How far were you from them?

A. I don't know how far, but it was not very far.

287 Q. When they were clearing up that track, how far were you from the boys that cleared that track?

A. Twenty or thirty feet.

Q. What had you been doing and were you doing at the time they were clearing the track?

A. Just before that I was pulling some bolts.

Q. When you quit pulling bolts, where did you go?

A. I got down on the floor beam.

Q. Did you get down on the floor beam at the place where you were pulling the bolts from?

A. I got down on the right hand side from where I was pulling the bolts.

Q. What were you pulling; pulling what, did you say?

A. Guard rail bolts.

Q. Then you were pulling guard rail bolts within thirty feet of the east end of the bridge, is that right?

A. Yes, sir.

Q. You hadn't put down the new guard rail then thirty feet of the east end of that bridge during that whole day, had you?

A. I think so.

Q. Wasn't the new guard rail that you put down on that bridge put on near the middle of the bridge, just east of and just west of the middle of that bridge, is that true?

A. They were put down some near the center of the bridge somewhere, I don't remember exactly where.

Q. Where did you begin putting them down when you first went to work?

A. I don't remember.

Q. How many did you put down?

A. I don't know.

Q. Did you put down one, two, three, or four?

A. I don't know how many we put down.

Q. Do you know whether you put down twenty-five, or not?

A. I know we did not.

Q. Do you know whether you put down more than one, or not?

A. I do not.

Q. And you can not come within twenty-four of the number of guard rails that you put down, or nearer than that?

Mr. McCORMICK: Was he working at the guard rails?

Mr. WERTH: You were working on the bridge, weren't you?

A. I was.

Q. You were doing a part of the work necessary to put down the guard rails, weren't you?

A. Yes, sir.

Q. You were pulling out the bolts of the old guard rails that had to be replaced by new ones, weren't you?

A. I was.

Q. Who was helping you to pull out the bolts?

A. Wm. H. Hinkle.

288 Q. Who else?

A. No one.

Q. If W. M. Hinkle was helping you to pull out the bolts, he wasn't helping to clear that track?

A. He did.

Q. You told the jury that W. M. Hinkle helped to clear that track, and that you saw him help to clear up that track, is that right?

A. Yes, sir.

Q. W. M. Hinkle is called Bill Hinkle, and he is the man who testified in this case, is he not?

A. Yes, sir.

Q. And you tell the jury that you saw Bill Hinkle help clear up that track; that is right, is it?

A. He helped to clear up the track.

Q. After you left from the place where you were pulling out the bolts and started to get in the clear, which way did you go from the men who were clearing up the track, east or west?

A. I walked right across the bridge, right straight across.

Q. You didn't go either to the east or west, but you got in the clear straight across from the bridge, from the place where they had the track obstructed with the timbers, is that right?

A. Yes, sir.

Q. Then, if that is so, and that place was thirty feet beyond the west end of the east span and the span was seventy feet long, you went into the clear one hundred feet from the east end of the bridge, didn't you?

A. No, sir.

Q. Did the plaintiff's attorney in this case (meaning Mr. Werth) ask you to give him for the benefit of the widow and children of Tom Holbrook a written statement of what you knew about this case?

Counsel for defendant objects to the form of the question, and also to the matter of it.

Objection overruled.

Defendant excepts.

Q. Did I ask you for such a written statement?

A. You asked me for a statement.

Q. Did the railroad company ask you for a statement?

Question objected to by counsel for defendant, because it is imma-

terial whether the railroad company asked him for such a statement, or not.

Objection overruled.

Defendant excepts.

A. They did.

289 Q. Did you give it to them?

A. I made off a statement, yes, sir.

Q. Did you make off a written statement of the facts within your knowledge of this accident and give it to the railroad company, or somebody representing the railroad company?

Question objected to by counsel for defendant.

Objection overruled.

Defendant excepts.

A. I did.

Q. Did you give a written statement to Mr. Werth?

A. I did not.

Mr. McCORMICK: Your Honor will understand that all of these questions are subject to objections, or do you want us to make the objection to each question? I do not see the relevancy of this evidence.

By the COURT: You had better make them each time.

Mr. McCORMICK: Well, we will save an exception to the ruling of the court as to the last question.

Q. Have you been advised by anybody representing the Norfolk & Western Railway Company at any time prior to this time not to talk to Mr. Werth or anybody representing the plaintiff, or to tell them anything that you knew about this case?

A. I have not.

Q. You have not been so advised by anybody?

A. I have not.

Q. Why, then, did you refuse to give Mr. Werth a written statement, after you had given one to the railroad company?

Question objected to by counsel for the defendant.

Objection overruled.

Defendant excepts.

A. Because I did not think I didn't have to.

290 Q. You did not, because you didn't have to?

A. I didn't think that I did.

Q. Did Mr. Werth tell you that he was employed and selected as counsel for the widow and children of Tom Holbrook? You understood that when he talked to you, didn't you?

A. I did.

Q. Was Tom Holbrook your fellow workman?

A. He was.

Q. Did you know he left a woman who was his wife and children who were his children, who were under twenty-one years old, and were infants?



Question objected to by counsel for defendant.  
Objection sustained.

Q. Have you been told by anybody since yesterday that witnesses in this case were being asked on cross-examination if they had been advised not to talk to plaintiff's counsel?

Question objected to by counsel for defendant.  
Objection overruled.  
Defendant excepts.

A. I have not.

Q. Nobody has told you that witnesses were asked that question on the witness stand, by the plaintiff's counsel, since yesterday?

A. No, sir.

Q. What kin is W. M. Hinkle to Dan Carbaugh?

A. Not any that I know of.

Q. What relation is he to him by marriage?

A. I don't know whether they married sisters—Hinkle though I believe married Dan's sister.

Q. Don't you know perfectly well that they are brothers-in-law?

A. Yes, sir.

Q. Well, why didn't you say so?

Question objected to by counsel for defendant.  
Objection overruled.

A. I did not understand the question.

Q. Didn't you understand my question to bring out the fact that Dan Carbaugh and W. M. Hinkle were closely connected together by blood or marriage; didn't you understand that to be the object of my question?

A. No, sir, I did not.

Q. What did you think I was asking about, and for what purpose did you think I was asking you that question?

A. I understood you wanted to know what kin they were.

Q. So you thought I meant blood relations?

A. Between the two parties, yes, sir, Hinkle and Carbaugh.

Q. When you were in the clear, were you standing by a bracket on a level with the track, or standing on the flange of the girder below the track?

A. Below the track.

Q. How far below the track?

A. Some four or five feet.

Q. Which was it, four or five feet?

A. I would say four anyhow.

Q. At least that much?

A. Yes, sir.

Q. At least four, and it might have been five?

A. Yes, sir, it might have been five.

Q. And you were standing on the flange of the girder?

A. Yes, sir.

Q. Now, by actual measurement it is an admitted fact in this case that the flange to the girder is about three feet below the track. If

a man was standing on the cross-tie, now, I want to know if in answering and saying it was at least four feet and might be five, if you were just about as accurate in giving the speed of that train as you are now in giving that distance?

Question objected to by counsel for the defendant.

Objection sustained.

By a JUROR: You left the impression on me a while ago that you had worked on the guard rails the day before, was I correct in catching that?

WITNESS: No, sir.

By a JUROR: You hadn't worked there the day before on the bridge?

WITNESS: No, sir, I had not.

By a JUROR: I understood you to say the smoke was thicker that day than it was before.

Mr. WERTH: He said the smoke was thicker that day than he had usually seen it before.

292 Mr. SMITH: Had you ever worked on that bridge before?

WITNESS: I do not remember whether I had, or not.

Mr. SMITH: You do not recall whether you had ever worked on the bridge there before, or not, as I understand you?

WITNESS: Yes, sir.

Mr. SMITH: Mr. Porter, which of the men were working on the guard rail at the time the signal was given that 92 was approaching, do you remember?

A. I do.

Q. Which were they?

A. You mean working on the guard rail?

Q. Yes, sir, working on the guard rail itself?

A. Pierce Walters was one of them, and Holbrook and Mr. Hinkle, and I don't know who else.

Q. What were you doing yourself?

A. I was robbing the guard rails.

Q. What do you mean by saying you were robbing the guard rails?

A. That is taking the bolts out of the old guard rails.

Q. Now, were you east or west of the men that were working on the guard rail?

A. I was west of them.

— How far west of them?

A. I wasn't very far, fifteen or twenty feet, or something like that.

Q. Now, did you mean to say just now that you got off opposite where you were at work or opposite where they were taking up the guard rail?

A. Opposite where they were taking up the guard rail.

Q. You got off the track and down on the girder opposite where they were taking off the guard rail?

A. Yes, sir.

Q. Now, without reference to what you have said, or may have said in reference to that, and after your memory has been refreshed,

give now as near as you can how far that was from the east end of the bridge?

A. It was something near the center of the first pier, the first span of the bridge, as well as I remember.

Mr. WERTH:

Q. I will ask you to tell what has occurred between the time that counsel for the plaintiff turned you over to counsel for the  
293 railroad company to refresh your memory on the matter referred to by Mr. Smith a moment ago in the last question he put to you, and just explain what it was that refreshed your memory?

A. There hasn't anything.

(Witness stands aside.)

J. J. HINKLE, for Defendant.

Direct examination.

By Mr. SMITH:

Q. What is your name?

A. John is my name.

Q. John Hinkle?

A. Yes, sir.

Q. Where were you working on the fourth of January 1913?

A. At Pando, W. Va.

Q. What kind of work were you doing?

A. Spacing ties; I was working on the bridge gang, spacing ties.

Q. With what bridge gang were you working?

A. C. M. Anderson's.

Q. Who had charge of that gang that day?

A. G. G. Carbaugh.

Q. Were you a member of the gang?

A. Yes, sir.

Q. Had you been a member of the gang some time before that?

A. No, sir, I hadn't been working but three weeks then.

Q. About three weeks then?

A. Yes, sir.

Q. When did you all go to work on that bridge that day?

A. We went to work about ten o'clock that morning.

Q. What had you been doing before that time?

A. Loading ties.

Q. What time did you all stop for dinner that day?

A. Twelve o'clock.

Q. What time did you commence work after dinner?

A. 12:30.

Q. How long after you commenced to work after dinner before No. 92 came along?

A. About ten minutes, ten or fifteen minutes.

Q. What was 92?

A. A time freight.

Q. Which way does it go, east or west?

A. It goes east.

Q. What were you doing at the time it came along?

A. Spacing ties.

Q. Do you remember what was the first knowledge that you had that 92 was coming?

A. Carbaugh hollered "Railroad."

294 Q. Where was he?

A. He was standing on that east bound track.

Q. Were there any men on the bridge framing the guard rails at that time?

A. Yes, sir.

Q. Who were they?

A. Hinkle, and Porter, and Harrison and Walters and myself, that is all.

Q. Now you have mentioned all of the men that were on that bridge, haven't you?

A. Yes, sir, except Carbaugh, he was on the bridge.

Q. Were all those men except yourself framing the guard rail at that time?

A. I don't know whether they were all framing the guard rail, or not.

Q. Do you remember which ones were framing the guard rail at that time?

A. Walters and Holbrook was framing the guard rail.

Q. State as near as you can where 92 was when Carbaugh hollered railroad?

A. Coming through the tunnel.

Q. What was done then by the men?

A. They picked up this guard rail and laid it off and got in the clear, cleared up the track.

Q. What were they framing the guard rail on?

A. Two short blocks, that laid across the rails.

Q. You say they picked the guard rail up and cleared it up and got in the clear, what became of those two short blocks?

A. They threw them off, too.

Q. Did you see those thrown off, or laid off?

A. I seen Carbaugh there throw his block in the hole.

Q. What do you mean by throwing it in the hole?

A. Throwing it off the bridge.

Q. You saw Carbaugh then, as I understand, throw one of the blocks off the bridge?

A. Yes, sir.

Q. What became of the other block?

A. I don't know.

Q. Was it taken off of the track, or not?

Question objected to by counsel for plaintiff, as leading.

By the COURT: Have you any recollection of your own about the other block?

WITNESS: No, sir.

By the COURT: You mean to say that you don't know at all whether it was, or was not, removed?

WITNESS: No, sir, I don't know whether it was moved, or not.

295 By the COURT: You said a few moments ago in answer to Mr. Smith that they threw the two blocks off, did you mean that?

WITNESS: What did you say?

By the COURT: You said a few minutes ago in answering Mr. Smith that they threw the two blocks off, did you mean that?

WITNESS: I meant that Carbaugh threwed his block off.

By the COURT: Did you mean that they threw both of them off?

WITNESS: No, sir, I don't know what became of the west block.  
Objection sustained.

By Mr. SMITH:

Q. Then what was done so far as you know by the men?

A. They got in the clear.

Q. State who you saw get in the clear?

A. I saw Holbrook catch hold of a bracket and step off the floor beam.

Q. On to what?

A. The flange of the girder.

Q. Did you see anybody else get in the clear?

A. Carbaugh.

Q. Anybody else?

A. No, sir.

Q. Did you get in the clear?

A. Yes, sir.

Q. Where did you get in the clear with reference to where the men who had been framing the guard rail were?

A. I went in the clear east of where they were framing the guard rail.

Q. Did anybody get in the clear near you?

A. Carbaugh?

Q. How near you?

A. He stood on the same flange of the girder that I was standing on.

Q. After you saw Holbrook and Carbaugh get in the clear, did you see anybody else outside the clear?

A. No, sir.

Q. Could you see the track sufficiently to see whether anybody else was on the track, or not?

Question objected to by counsel for plaintiff.

Objection sustained.

296 Q. How far could you see after you got in the clear yourself?

A. About three hundred feet.

Q. In which direction could you see about three hundred feet?

A. West.

Q. Could you see as far as across the bridge, looking west, after you got in the clear?

A. Yes, sir.

Q. Then state to the jury whether you saw anybody on the track, after you got in the clear, looking west?

A. No, sir.

Q. Did Mr. Holbrook get in the clear west of where you got in the clear, or east of where you got in the clear?

A. West.

Q. How far west of where you got in the clear to where he got in the clear?

A. About sixty feet.

Q. Please state who was the last man you saw get in the clear?

A. Carbaugh.

Q. Please state if you saw anybody else on the bridge not in the clear after you saw Carbaugh get in the clear?

A. No, sir.

Cross-examination.

By Mr. WERTH:

Q. What kin are you to Carbaugh?

A. I am his nephew.

Q. You say you could see three hundred feet from that bridge in the place you were in, looking west?

A. Yes, sir.

Q. How far were you from the east end of the bridge where you were in the clear?

A. About thirty feet.

Q. Then you could stand where you were in the clear and look two hundred feet, or one hundred feet into the tunnel, is that right?

A. No, sir.

Q. Do you know how long the bridge is?

A. No, sir.

Q. The bridge, John, is two hundred and twenty-eight feet. Now when you were standing where you were in the clear, you couldn't see in to the tunnel, could you?

A. No, sir, I could not see in the tunnel.

Q. When you said you could see three hundred feet, looking west, you were just guessing at that distance?

A. Yes, sir.

Q. And you think you are mistaken; you couldn't see three hundred feet looking west from where you were at, could you?

A. No, sir.

Q. That would be making you looking way into that tunnel, one hundred feet or more, isn't that so?

A. I don't know.

297 Q. You don't know how far you could see looking west do you?

A. No, sir.

Q. Now, John, when No. 92 came out of the tunnel, how long a train was it?

A. About a quarter of a mile.

Q. About a quarter of a mile long — how many engines did it have?

A. Two.

Q. Which way was it going, up or down grade?

A. Up grade.

Q. It was making a heap of noise, was it, or a little noise?

A. It was making a right smart noise.

Q. It was making a whole lot of noise, wasn't it?

A. It wasn't making so much.

Q. *It was making a whole lot of noise, wasn't it?*

A. *It wasn't making so much.*

Q. Wasn't it a time freight?

A. Yes, sir.

Q. Running over that bridge, wasn't it?

A. Yes, sir.

Q. It makes a heap more noise running over that bridge, it rumbles a good deal more, running over the bridge, don't it?

A. Yes, sir.

Q. Isn't that true that they make a whole lot more noise running over a bridge, they make a rumbling noise?

A. No, sir, they don't make so much more running on a bridge.

Q. Does a freight train make more noise than a passenger train?

A. Yes, sir.

Q. Now, that freight train had two engines to it, didn't it?

A. Yes, sir.

Q. Were the engines in front or behind?

A. One was in front and one was behind.

Q. Aren't you wrong about that, about there being one behind; weren't they both in front?

A. No, sir.

Q. Think now, right good on that; weren't both of those engines in front?

A. No, sir.

Q. Are you certain about that; do you mean to stick to that, that one was behind and one was in front?

A. Yes, sir.

Q. Are you sure you are not mistaken about it? Think right good now. I don't want you to make a mistake.

A. I know one was in front and the other behind.

Q. And you say it was a quarter of a mile long?

A. Yes, sir.

Q. You think that is about right?

A. Yes, sir.

Q. Isn't that longer than that train was?

A. That is as near as I can guess at it.

Q. How many cars did it have; let's see if you know that.

298 Just guess at that; how many cars would you say they had on it?



A. About fifty.

Q. How much smoke would that train make in that tunnel, a whole lot, wouldn't it?

A. Yes, sir, it made right smart smoke.

Q. And it drew it all out on the bridge; as the cars came out, each car would pull that smoke out on the bridge, and it would settle all over the bridge, wouldn't it?

A. Yes, sir, right smart of it settles on the bridge.

Q. It would begin settling on the bridge at the west end and finally cover it, the whole bridge?

A. No, sir, it didn't cover the whole bridge.

Q. How much of the west end would it cover, do you think? It would cover a whole lot, wouldn't it?

A. About half of it or a little more.

Q. It did cover more than half of it, didn't it?

A. I don't know.

Q. Didn't the smoke go within thirty feet of the east end, and didn't the smoke come to where you were?

A. No, sir, I don't believe it did.

Q. Wasn't that smoke thick, and didn't it settle on the bridge right thick?

A. Yes, sir, it settled on there pretty thick.

Q. And it was pretty dark where it settled, and you couldn't see through it, could you?

A. No, sir, not west, you couldn't.

Q. There was more smoke west of you than east of you, a whole lot more, wasn't there?

A. Yes, sir.

Q. Looking west, you would be looking into thick smoke?

A. Yes, sir.

Q. And the dark tunnel was there at the west end of the bridge?

A. Yes, sir.

Q. And on the contrary, looking east, you were looking against a bright sky?

A. Yes, sir.

Q. You could see a whole lot better looking east than west, couldn't you?

A. Yes, sir.

Q. Now looking east, you could see a train where you were, coming east, couldn't you?

A. Yes, sir, you could see two hundred yards.

Q. Two hundred yards?

A. Two hundred feet, I mean.

Q. You were how far from the east end of the bridge?

A. How far was I standing from the east end of the bridge?

Q. Yes, sir, when you and Carbaugh were in the clear there?

A. About thirty feet.

Q. Then the train would be one hundred and seventy feet from the east end of the bridge when you could first see it?

A. One hundred and thirty feet.

Q. You say you were standing thirty feet from the east end of the bridge?

A. Yes, sir.

Q. And you say you could see a train about two hundred feet from where you were?

A. Yes, sir.

Q. That would be one hundred and seventy feet that you would see the train from the east end of the bridge, that is right. I am not asking you to make the calculation, may be you don't know, but that is about the distance that you could see the train, you said two hundred feet?

A. Yes, sir, I said two hundred feet.

Q. And you were thirty feet inside the bridge?

A. Yes, sir.

Q. Suppose you cut that thirty feet off the two hundred feet, because I am asking you to count from the east end of the bridge, then you would have one hundred and seventy feet from the east end of the bridge at which you could see the train; that would be right; wouldn't it? Which did you mean when you said you could see a train two hundred feet, when I asked you a little while ago how far you could see a train, which did you mean?

A. Two hundred feet from where I was standing.

Q. If you had been standing thirty feet further east, and right at the end of the bridge, then you could see that train about one hundred and seventy feet?

A. If I had been standing further east.

Q. Yes, sir, you said you were thirty feet from there. Now, say you had gone plumb to the east end of the bridge, then you would have been thirty feet nearer to where you could see a train from, making it one hundred and seventy feet that you could see a train if you had been standing at the east end of the bridge, that is right, isn't it?

Question objected to by counsel for defendant.

Objection overruled.

Q. Had you been standing at the east end of the bridge, then you would have seen the train about one hundred and seventy feet, that is right, isn't it?

A. Yes, sir, if I had been standing thirty feet further.

Q. What was Carbaugh doing standing there by you, how did he happen to get in the clear the same place you did?

A. He walked up there and stepped down by the side of me.

300 Q. Were you standing on the flange of the girder, or by the bracket level with the track?

A. I was standing on the flange of the girder, and had hold of the bracket.

Q. Then you were down three feet below the level of the track?

A. Yes, sir.

Q. You could not see as well down there as you could if you had been standing on the level with the track, could you?

A. No, sir.

Q. Was Carbaugh standing by the side of you?

A. Yes, sir.

Q. He was down under there and standing on the flange of the girder?

A. Yes, sir.

Q. He wasn't standing up on a level with the track, was he?

A. No, sir.

Q. He was thirty feet away from the east end of the bridge, wasn't he?

A. Yes, sir.

Q. He didn't go to the east end of the bridge and stand there and watch for the second No. 15, did he?

A. He was watching for it.

Q. I asked you if he went to the east end of the bridge and watched for it?

A. I don't know whether he went there to watch for it, or not, but he was at the east end of the bridge with me.

Q. You said that you and he were together, and in thirty feet of the east end of the bridge, that is what you said just now, didn't you?

A. We were near the end of the bridge.

Q. Is thirty feet near, when a bridge is just two hundred twenty-eight feet long, are you near the end of it, when you say you are within thirty feet of it?

A. Yes, sir.

Q. When you say that you were near the end of the bridge, you mean you were in thirty feet of the end of it?

A. Yes, sir.

Q. And Carbaugh wasn't standing up on a level with the track, or standing on the track looking east watching for 15; he was standing there by you?

A. He was watching, standing by me, but he was looking east.

Q. How do you know he was watching, were you looking east?

A. Yes, sir.

Q. Was he on the same side of the bracket that you were on?

A. No, sir.

Q. He was on the other side of the bracket?

A. He was on the east side of the bracket and I was on the west side.

Q. Now, how do you know that he was, being down in there three feet from the level of the track, how do you know  
301 that he was looking east and watching for second 15; how do you know that?

A. I could see.

Q. When a man is watching for a train to appear, and he expects that train to appear any minute, he has got to keep his eyes on that track, hasn't he?

A. No, sir, he can look out.

Q. I am talking about his eyes on the track, east of it, he is going to keep his eyes on the track watching for the train?

A. Yes, sir.

Q. Then how could you tell that Carbaugh was keeping his eyes on the track and watching for second No. 15 and you were standing on the other side of the bracket; did you watch Carbaugh?

A. Yes, sir. I was looking right at him.

Q. Suppose Carbaugh had turned his head around and got to gazing around, were you watching him closely that you know that he did not quit looking for that train half a minute?

A. Yes, sir.

Q. You just kept watching Carbaugh?

A. I was looking right at him.

Q. And you know Carbaugh did not quit looking for that train a half a minute?

A. No, sir.

Q. He just kept watching faithfully like a man should watch?

A. Yes, sir.

Q. If you know that, how can you tell what was going on west of there?

A. I don't know what was going on west after I got in the clear.

Q. You never saw Holbrook after you got in the clear, then?

A. No, sir.

Q. And you don't know whether Holbrook, or anybody else, left a piece of timber on the track and Holbrook saw it and went back on that track?

A. Carbaugh never left his on the track.

Q. Why do you say so; he wasn't helping to do that framing, was he?

A. No, sir.

Q. Carbaugh ordered them to clear that track when 92 ran, and he didn't clear the track himself, it wasn't his business to clear the track, was it? It was his business to order it to be done?

A. He picked up a block.

Q. What became of Walters and Tom Holbrook and the other men that were helping to do that framing; what was Carbaugh doing their work for?

A. He just came over there and picked the block up and threwed it off.

Q. Who was standing right by him when he did that?

A. I don't know whether anybody was standing by him, or not. I walked up right behind him.

Q. And you saw him do that?

A. Yes, sir.

302 Q. And then he went right straight and got in the clear at the same place you did?

A. Yes, sir.

Q. And you never saw anything more?

A. No, sir.

Q. When you left there, you left one piece of this framing, or one of those blocks across the west bound track, didn't you?

A. I don't know.

Q. I say, that you saw at one time both of them on the track, didn't you?

A. Yes, sir.

Q. And you saw the guard rail on top of them?

A. Yes, sir.

Q. And when you left there you had seen the guard rail taken off and one block taken off, and you had not seen the other taken off?

A. No, sir.

Q. When you left there, you left one of those blocks on the track, so far as you know?

A. Yes, sir.

Q. And you never saw anybody take that block off?

A. No, sir.

Q. And Carbaugh left with you and got in the same place in the clear with you, didn't he?

A. Yes, sir.

Q. Whereabouts were they framing this piece of timber on the bridge, with reference to the middle of the bridge, whereabouts between the two ends, and which end was it nearer to?

A. It was nearer the west end.

Q. It was a little beyond the middle, a little ways of the middle of the bridge that they were doing that work, wasn't it?

A. It might have been a little, but it was something near the middle of the bridge.

Q. If there was any difference, it was nearer the west end?

A. Yes, sir.

Q. Now, you say that Holbrook went into the clear sixty feet west of you; did he get in that clear before you and Carbaugh, or after you and Carbaugh?

A. Before me and Carbaugh.

Q. Did he leave the place before you and Carbaugh, I mean, where they were doing the framing?

A. He got into the clear before me and Carbaugh got in the clear.

Q. What became of Walters; wasn't he there where they were framing that piece of timber?

A. Yes, sir.

Q. Well, what became of him?

A. I don't know where he went to.

Q. So, when you and Carbaugh started to get in the clear there, and Holbrook started to get in the clear, Holbrook was going west and you and Carbaugh were going east; that is right, isn't it?

A. Yes, sir.

303 Q. And after that you never saw Holbrook any more?

A. No, sir.

Q. And 15 passed right by you, where you were standing in the clear when it came?

A. Yes, sir.

Q. How fast was it going?

A. About thirty or thirty-five miles an hour.

Q. All of you seem to have the same opinion about that speed. Did you ever talk to anybody about the speed of that train that day, or did anybody tell you how fast that train was running?

A. No, sir, nobody ever told me to tell how fast it was running.

Q. You are just guessing at it; that is your own opinion, is it?

A. Yes, sir.

Q. When you and Carbaugh started to get in the clear away from where they were framing the timber, how close had you been to where they were framing, right close at them?

A. I was about ten feet west of them.

Q. So that you came by where they were framing when you started to go in the clear?

A. Yes, sir.

Q. What were you walking along, on the outside or inside of the west bound track?

A. The inside.

Q. Then when you came along that guard rail you stepped over that block and walked on and got in the clear and left that block, except the one that Carbaugh threw into the river, on the track?

A. As I walked by they were taking the guard rail off.

Q. You stated awhile ago that you never saw anybody take off one of the blocks, and so far as you knew it was there when you left it, and you came right along down the track where that block was laying across it, is that right?

A. I seen them pick the guard rail off the block.

Q. That is right, you saw them pick the guard rail off and lay it on the end of the tie in the clear?

A. Yes, sir.

Q. Then you saw them take one of the blocks off and throw it in the hole, you said?

A. Yes, sir.

Q. And you were then walking from beyond west of where they were framing, and walked right by that place and went on and got in the clear?

A. Yes, sir.

Q. And one of those blocks that they had across the track you left there when you went by there, they didn't throw that off, you didn't see anybody throw it off, did you?

A. No, sir, I didn't see anybody throwing it off. I don't remember ever seeing the block there.

Q. You just said a little while ago they had two blocks  
304 and a guard rail on top of them; you saw them then, didn't you?

A. Yes, sir.

Q. And you never looked back any more after you went in the clear? You said that also, didn't you?

A. I looked back after I got in the clear once.

Q. Did you?

A. Yes, sir.

Q. Now, John, be careful about that, because you said something—

Question objected to by counsel for defendant.

Q. Be Carefully in your answer and consider it before you make

it. Did you, after you got in the clear, look back to see that block on the track?

A. No, sir.

Q. You never did see that block after you passed it?

A. No, sir, I never saw the block.

Q. After you passed by going in the clear, you never looked back and saw that track clear of that block, did you?

A. No, sir.

Q. You don't know but what that block was on the track when 15 passed there?

A. No, sir, I don't know whether it was on there.

By Mr. SMITH:

Q. You say that you did look back after you passed the block?

Question objected to by counsel for plaintiff.

Q. You looked back, after you got in the clear, once. Now, tell the jury whether you saw that block, or not?

A. No, sir, I never saw the block.

Q. Were you within sight of where they had been framing the guard rail, at that time?

A. Yes, sir.

(Witness leaves the stand.)

D. G. CARBAUGH, for Defendant.

Direct examination.

By Mr. McCORMICK:

Q. Where do you live?

A. Graham, Va.

Q. Who do you work for?

A. C. W. Anderson was my foreman and I work for the Norfolk & Western Railway Company.

305 Q. Who were you working for on January 4, 1913?

A. I was working for the Norfolk & Western Railway Company.

Q. What were you going on that day?

A. I was doing bridge work.

Q. What time did you begin work that morning?

A. At seven o'clock.

Q. What time did you begin the bridge work?

A. About ten o'clock, something near ten o'clock.

Q. What work had you been doing prior to the bridge work?

A. Loading ties, bridge ties.

Q. When you went on the bridge, that, if any, warning did you give the men?

A. I told them that there was a tunnel close to the bridge and a curve at the other end, and it was a dangerous point, to be mighty careful there, and when a train was going east on the east bound



track, or one on the other track, if the train was going either way, to get in the clear of both tracks.

Q. Who was present at the time you made that statement to the men?

A. Do you want me to name the fellows that were present?

Q. I want particularly to know if Mr. Holbrook was present.

A. Yes, sir.

Q. What time did you stop for dinner that day?

A. At twelve o'clock.

Q. What time did you get back?

A. 12:30.

Q. What time after you got back to work was it that No. 92 passed through the tunnel?

A. It was about 12:40, I guess.

Q. About ten minutes after you began work there?

A. Yes, sir, from ten to fifteen minutes.

Q. What, if any, warning did you give at that time?

A. I hollered "Railroad"; get in the clear over there, 92 is coming through the tunnel.

Q. Were you doing any work yourself that day?

A. I was not.

Q. What were you doing?

A. I was standing on the east bound track looking out for the fellows that were doing the work.

Q. How do you mean looking out for the fellows that were doing the work?

A. Watching for them to see that nothing would run up on them.

Q. When you hollered railroad, clear the track, what did the men do?

A. They picked up the piece of timber which they were framing and laid it over on the opposite rail on the ends of the ties, on the outside of the rail, and by that time No. 92 had come on to the end of the bridge, and I stepped over on to the west bound  
306 track and picked up a short piece of timber which we were framing on and threw it into the hole down under the bridge.

Q. Do you remember the names of the men who were working at the framing of that piece of timber?

A. Yes, sir; W. P. Holbrook and Pierce Walters.

Q. Who removed that piece of timber?

A. The piece we were framing, you mean?

Q. Yes, sir.

A. W. T. Holbrook moved the east end and Pierce Walters the west end of it.

Q. Who saw them do it?

A. I did.

Q. What was the length of that piece of timber that they removed?

A. Something near twenty feet.

Q. What do you call it?

A. A guard rail.

Q. What was it resting on, if on anything?

A. Two old pieces of guard rail laying across the rail.

Q. Who removed them, if anybody?

A. I moved the one at the east end and W. T. Holbrook moved the one at the west end.

Q. Did you see him do it?

A. Yes, sir.

Q. When you gave the warning to clear, or railroad first, and clear the track, was the track clear of the timber?

A. When I gave it?

Q. Yes, sir; or was it cleared afterwards?

A. It was cleared afterwards, after I gave the warning.

Q. Then there was no timber on the track, was there?

A. No, sir.

Q. Where did the men go?

A. They stepped down on the floor beam, and on the girder flange.

Q. Who was the last man to get off the track?

A. I was, myself.

Q. Who did you go with?

A. With young Hinkle, J. J. Hinkle.

Q. Where did Holbrook go?

A. He went over about the center of the second span, or the middle span, rather.

Q. And you say that was about 12:40?

A. 12:40 or 45. Somewhere along there.

Q. How long was it after you cleared before you heard, if you did hear, the second section of No. 15 coming?

A. It was about something between a half a minute and a minute.

Q. Did you get out of the clear, or did you stay in the clear?

A. I staid in the clear.

Q. What, if anything, did you do, when you saw or heard second section of No. 15 coming?

A. I didn't do anything. I just staid there in the clear and looked up the road.

307 Q. What, if anything, did you say?

A. I hollered "Railroad."

Q. From what point did you holler?

A. Near the east end of the bridge.

Q. Where were you standing?

A. I was standing in about thirty feet of the east end of the bridge down on a floor beam on the flange of the girder.

Q. Do you know how far Holbrook was from you at that time?

A. About sixty or seventy feet.

Q. Can you state to the jury in what tone of voice you gave that warning?

A. I hollered "Railroad."

Q. How loud?

A. About as loud as I could holler.

Q. Could a man hear it sixty feet off?

By Mr. WERTH: We object to that question, and ask the court to pass on my objection.

By the COURT:

Q. I will put this question to the witness: Taking into consideration the distance that Holbrook was from you, and the noise of the passing freight train, and possibly the noise of the approaching passenger train, are you, or not, of opinion that Holbrook could have heard your cry of "Railroad"?

A. I am of opinion that as loud as I hollered it could have been heard.

By Mr. McCORMICK:

Q. By Holbrook?

A. Yes, sir.

Q. Now, at that time, what was the condition of that track?

A. In first class shape.

Q. I mean was it cleared of timber?

A. Yes, sir; cleared of everything at the time we left the bridge it was clear of everything, men and timber.

Q. I understood you to say that you were the last man to get off the bridge?

A. Yes, sir.

Q. And when you got off the bridge, you staid in the clear?

A. Yes, sir.

Q. Now, Mr. Carbaugh, when you saw second 15 coming, did you see it or first hear the blasts of the whistle?

A. I first heard it blow.

Q. How far from you, do you suppose, when you heard it blow?

A. I suppose when I heard it blow it was something like a thousand feet from the bridge.

308 Q. At what point of time then did you give that warning of the approach of that train?

A. Just as soon as I heard it blow.

Q. At what point could you first see second 15?

A. About one hundred and fifty yards east of the bridge.

Q. That is four hundred and fifty feet, three times one hundred and fifty, three feet to the yard?

A. Yes, sir.

Q. At that point of time you gave warning and the whole track was clear of men and timber?

A. At that point of time the timber and men had been cleared of the track before that. I didn't look back at that point of time, I didn't look back west to see that there was no man on the bridge.

Q. One of your duties, as described by the rules, was to see that the track was clear. Did you see that it was clear?

A. Yes, sir.

Q. Before you cleared, yourself?

A. Before I got in the clear myself.

Q. Doing the work that you were doing there that day, framing the guard rail, was it necessary to send out a flagman?

A. No, sir.

Q. Did you send out a flagman?

A. No, sir.

Q. Did you put down a torpedo?

A. No, sir.

Q. Was it necessary to do it?

A. No, sir.

Q. What precautions did you take to protect the men there that day?

A. By standing on the bridge and watching for them.

Q. And after you watched for them, what did you tell them with respect to the approach of any train, if anything?

A. To get in the clear.

Q. I understood you were watching all day?

A. Yes, sir, all the time they were on the bridge I was out there watching for them.

Q. You were doing no work there yourself?

A. No, sir.

Cross-examination.

By Mr. WERTH:

Q. You said it was not necessary to send the flag out. If you had sent a flag out, Tom Holbrook would have been alive today, wouldn't he?

A. No, sir; it was not necessary to send a flag out.

Q. I asked you if you had sent a flag out Tom Holbrook would have been alive today?

A. I don't know about that.

Q. Don't you know that a flag would have saved his life and prevented a collision between him and the train?

A. I don't know whether it would, or not.

Q. Don't you think that a flag would have prevented that accident?

A. I think if a flag had been out and stopped No. 15 at the bridge that it would have prevented it.

Q. Don't you believe that if you had had a flag out that Tom Holbrook would not have been hit by the train?

Question objected to by counsel for defendant.

By the COURT: The objection is overruled; I think the plaintiff's counsel is entitled to make manifest before the jury the attitude of the witness.

Defendant excepts.

A. I don't know; I couldn't say.

Q. Haven't you so stated in black and white over your own signature?

A. Yes, sir.

Q. Well, what makes you think that that train was a thousand feet away when you heard the whistle?

A. The whistled post, where they generally whistled, is about a thousand feet from the bridge.

Q. What whistle post do you refer to?

A. The whistle post up through the cut.

Q. What is that whistle post for?

A. For them to blow, I suppose, when they get to that.

Q. Blow for what?

A. They generally blow for road crossings.

Q. What is that whistling post that you refer to—you know what a railroad crossing blow is, and what the post indicates—now, what was that whistle for?

A. They might be on a curve.

Q. I am not asking you what they might be on, or this, that, or the other. I am asking you why did that train blow a thousand feet east of that bridge for?

A. I don't know that.

Q. Do you know the signals?

A. Yes, sir.

Q. Do you know the station signal?

A. Yes, sir.

Q. Do you know the alarm signal for cattle and men on the track?

A. Yes, sir.

Q. Do you know the signal for blowing in a flagman?

A. Yes, sir.

Q. Now, tell me what that signal was that you heard?

A. The signal he blowed, he blowed two long blows, I don't know what that signal was for, unless it was for the tunnel.

310 Q. Is there any such signal in the book of rules that you have referred to as two long blows for the tunnel?

A. I haven't saw it.

Q. Did you ever hear of it?

A. I don't know that I have.

Q. Is there any such signal as two long blows for a tunnel?

A. If there is I don't know it.

Q. Is there any such signal as two long blows for a bridge?

A. No, sir.

Q. Then, can you tell the jury why that engineer blew two long blasts a thousand feet east of that bridge, when he wasn't in sight of it?

A. I don't know that; I don't know why he blowed that.

Q. Then, you can not account for these two long blasts, can you?

A. I know he blowed them.

Q. I am not asking you that. You have already stated that in chief, but I am asking you if you can account for them?

A. Not unless it was for the tunnel warning.

Q. You have already stated that there was no such rule known in the rule book as a whistle for tunnel warning, haven't you?

A. I never saw it.

Q. Why would you surmise that it might be two long blows for the tunnel warning, rather than for the man in the moon, or something else; one guess would be just as good as another, wouldn't it? And the truth is that you have no idea what those two long blows were blown for.

MR. McCORMICK: What difference does it make, if your Honor please, what it was blown for, and why waste all this time on that point. The point is whether or not he heard the whistle of the train,

and whether there were two blasts, or three, is utterly immaterial, and for that reason it seems to me that we are consuming time and making an immense record here, when we can save it.

Objection overruled.

Defendant excepts.

A. I do not.

Q. The train, according to your statement, was a thousand feet east of the tunnel when they were blown, and was not in sight of the bridge, was it?

A. No, sir.

Q. And the train was not in your sight, was it?

A. No, sir.

Q. How then can you figure it that it was a thousand feet?

A. That would be my idea about it.

311 Q. That is your idea?

A. Yes, sir.

Q. What do you base that idea on?

A. I could see something like half that far.

Q. Half that far would be five hundred feet, wouldn't it?

A. I could see about four hundred and fifty feet, and it was some several seconds before he came in sight.

Q. And you figured that because it was several seconds before he came in sight, that therefore, he must have been about 1,000 feet?

A. Yes, sir.

Q. And the whistling post had nothing in the world to do with your figuring how far he was away, did it?

A. I don't know; they generally blow at the whistle post.

Q. I am asking you now if the whistling post had anything to do with your putting the distance at a thousand feet?

A. I can not say that it did.

Q. Then, why did you tell the jury about the whistling post and try to explain it by the whistle post?

A. The whistle post was something near that distance from the bridge, I think, and I presume it was about the whistle post that he blew.

Q. And that is the best reason you have got for thinking it was a thousand feet away, because there is a whistle post something near a thousand feet from the bridge, although you admit that the whistle post had no connection with the signal he blew, is that right?

A. How is that?

Q. Read the question. (Question read.)

A. Yes, sir, I think so.

Q. I want to know if there is any public crossing east of the bridge at Pando, or a county road?

A. No, sir.

Q. Then, you could not think that he was blowing for the county road crossing?

A. I do not think he was blowing for any county road crossing.

Q. Then, what did you talk about any road crossing to the jury for?

A. I said sometimes they blew the crossing signal.

Q. What connection has that got with this case, and the facts in this case, if there was not a county road anywhere about Pando?

A. None that I know of.

Q. Then what was the point of your referring to the whistle for the crossing and saying it was two long blasts and a short?

A. I didn't say two long blasts and a short. I said two long blasts is all I heard.

Q. Two long blows is not a crossing signal, is it?

A. No, sir.

Q. Who was with you when you were in the clear?

A. J. J. Hinkle.

312 Q. How far were you from the east end of that bridge?

A. About thirty feet.

Q. Where were you in the clear, level with the track, or three feet below the track?

A. I was below the track.

Q. About three feet below the track, weren't you?

A. Yes, sir, about that.

Q. On the east side of the bridge, is that right?

A. No, sir, I was on the west side.

Q. Then, Hinkle was on the east side, is that right?

A. Yes, sir, of the floor beam.

Q. And you are sure that you were on the west side and that Hinkle was on the east side?

A. Yes, sir.

Q. And when you were watching east, you were looking right across where Hinkle was?

A. Yes, sir.

Q. Your vision was right square across Hinkle?

A. I was looking right in front of Hinkle.

Q. If Hinkle wanted to watch you to see if you were watching for the train he would have to have been looking west, wouldn't he?

A. I suppose so.

Q. If Hinkle had been looking west, he never could have been looking east?

A. If he had been looking west he could not have been looking east.

Q. That is, if he kept his eyes on you?

A. No, sir.

Q. You can clear just as well on those braces and stay on a level with the track, can't you?

A. Yes, sir.

Q. You were the foreman of that gang?

A. Yes, sir.

Q. Wouldn't you have been in a much better position to see the train approaching on the west bound track, to have been on a level with the track instead of three feet below the level of the track?

A. It would have been a little better position, I guess.

Q. Would not you have been in a very much better position, and weren't you in a very bad position to see the approach of a train on the west bound track, to be down there three feet below the level of the track?



A. I don't think so.

Q. You say before 92 ran, you stationed yourself on the east bound track to watch for the train?

A. Yes, sir.

Q. The men were all working on the west bound track?

A. Yes, sir.

Q. I want to know if you were stationed on the east bound track, wouldn't it have been a very bad position to have discovered a train approaching from the east around the curve?

A. No, sir.

Q. Why wouldn't it? Wouldn't it have been on the inside of the curve?

A. Yes, sir.

313 Q. Can you see as far when you are on the inside of the curve as on the outside of the curve?

A. Yes, sir, on that curve you can.

Q. This diagram here represents the bridge at Pando, and the approaches east and west. Where I have my pencil is a tunnel. This is the bridge and this is the curve east of that bridge. I understand you to have stationed yourself on the east bound track?

A. Yes, sir.

Q. To watch for a train which had been announced as coming on the west bound track, going west?

A. Yes, sir.

Q. And you tell the jury that you could see such a train from that track, as well as you could from this track, and could see it as far, is that true?

A. I think a man standing on this straight track could see a train about as far up here as he can this way (indicating.)

Q. You think you could see as far as you can on the west bound track?

A. Yes, sir.

Q. Then you state to the jury that a position inside the curve is just as good as a position on the outside of the curve to see a train approaching you around the curve, is that right?

A. If I had been on the outside of this track, over here (indicating), of course I could have seen a little further.

Q. It being on the outside of the track would have helped you some. I ask you if being on this track wouldn't have been an improvement over the east bound track?

A. Mighty little.

Q. Then, why would being on the outside of the track help you any?

A. It puts you over there about eight or ten feet further.

Q. Wouldn't this put you over there from the east bound track, to have moved over on the west bound track, wouldn't it have moved you over there still more?

A. It would have put you over there some, of course.

Q. How wide are those two tracks from outside rail of one track to the outside rail of the other?

A. Seventeen feet, eight and one-half inches.

Q. To have gone from the center of the east bound track to the outside rail of the west bound track would have moved you north how many feet?

A. From the center of this track (indicating)?

Q. Yes, sir.

A. About right close to fifteen feet.

Q. Wouldn't that have helped you to discover a train approaching on the west bound track, and going west, around the curve east of that bridge; in other words, couldn't you have seen that train at a point much further east of the bridge?

A. Not but a mighty little further.

314 Q. When you started away from where they were framing those timbers, or had been framing them, to get in the clear, I understand you went east?

A. Yes, sir.

Q. And you stopped and got in the clear within thirty feet of the east end of the bridge?

A. Yes, sir.

Q. And I understand that Tom Holbrook went west?

A. I didn't see him going west—well, he went from the east end of this guard rail, he went twenty foot west and picked up that old piece of timber and threw it over on the edge of the ties, and stopped down in the clear.

Q. At what point in that bridge were they framing the guard rail with reference to the center of the bridge, east and west?

A. They were a little bit east of the center of the bridge.

Q. Then, they were about, or near the middle of the bridge?

A. Something close to it.

Q. Now, when Mr. Holbrook went into the clear, did he—

Q. And you went into the clear thirty feet from the east end to end?

A. It was right close to the middle.

Q. And you went into the clear thirty feet from the east end?

A. Yes, sir.

Q. Tom Holbrook was seventy odd feet west of you?

A. Something like sixty or seventy feet.

Q. He may have been eighty feet, might he not?

A. I do not think he could hardly have been that much.

Q. You are just guessing at the place that he went into the clear; you didn't mark it, and had no reason to mark it at the time, did you?

A. No, sir.

Q. There is no way that you can identify the place that he went into the clear, is there?

A. I can take you to the floor beam.

Q. How can you place the floor beam when all are exactly alike?

A. It was at the middle floor beam of the middle span.

Q. Where was he when his body was picked up?

A. He was near the west end of the bridge.

Q. How many cars were in that freight train that went by there that day, No. 92, about?

A. I suppose from forty to forty-five cars.

Q. Wasn't there more than that?

A. I don't know; but my judgment would be forty to forty-five, may be fifty, and there might have been sixty, I don't know, I never counted them.

Q. Was it a double header, or one engine?

A. It was a double header.

315 Q. Where were the engines, in front, or one in front and one behind?

A. Both of them were in front, as well as I remember, but I am not sure about that, but I think they were both in front.

Q. Were they going down grade or up grade?

A. Going up grade, the freight train was.

Q. Does a freight train going over a bridge make more noise than a train on the ground?

A. Yes, sir.

Q. Now, if Mr. Holbrook was seventy or seventy-five feet west of you, and that train was passing on that bridge, why is it that you are of the opinion that he heard you?

A. I think I hollered loud enough to have been heard at the other end of the bridge.

Q. You think that your voice overcome the noise of the freight train on the bridge and that you could make him hear you, anyhow?

A. I believe it could have been heard.

Q. What sort of a bridge man was Holbrook?

A. He was a good bridge man.

Q. A first class?

A. Yes, sir.

Q. He had been in the service of the company a long time, hadn't he?

A. He had been in the service a good while, yes, sir.

Q. He had been reprimanding some of your men that very day for being careless, hadn't he?

A. Yes, sir.

Q. He was not only careful himself, but was cautioning and rebuking others because they had not been careful; that was true, wasn't it?

A. Yes, sir.

Q. If there was no timber on the west bound track, there would have been no reason on earth for Holbrook to get back on that track after getting in the clear?

A. There was no timber on the west bound track. I don't know why he got back on the track.

Q. I asked you if there was any reason on earth why he should have gotten back on there?

A. No, sir.

Q. And you can think of none?

A. No, sir.

Q. He was disobeying orders to get back there, wasn't he?

A. Yes, sir.

Q. He was violating your orders and walking with his eyes

open in to a place of danger, according to your statement, is that true?

A. Yes, sir.

Q. And all for no purpose on the face of the earth, if your statement is true?

A. None that I know of.

Q. Do you know any reason why Mr. Holbrook should have wanted to commit suicide?

A. No, sir.

Q. And in you tell the jury that in your opinion he  
316 heard you holler railroad?

A. I don't see why he couldn't have heard it.

Q. You have stated that he got off the west bound track and got in the clear?

A. Yes, sir.

Q. He was hit by fifteen?

A. Yes, sir.

Q. Then he must have gotten out from where you saw him go and got back on the track?

A. Undoubtedly that is true.

Q. And he must have done it without any reason in the world?

Question objected to by counsel for defendant as argumentative.

Q. It is your opinion that he heard you holler railroad, and is that consistent with the idea that he was sane and did not want to commit suicide?

Question objected to by counsel for defendant.

Objection sustained.

Q. Is it your opinion that Tom Holbrook would have gotten in front of fifteen if he had heard you?

A. I do not think so.

Q. Then how can you reconcile those two opinions?

A. It don't look as though the man would have gotten in front of the train if he heard me.

Q. You are of the opinion that Tom Holbrook would not have gotten in front of that train if he heard you, and you have stated to the jury that you are of the opinion that he did hear you. Now, reconcile those two opinions to the jury if you can?

A. I don't know how to do it.

Q. Of course you don't know how to do it. Then, do you continue to be of the opinion that he heard you, notwithstanding the fact that you can not reconcile those two opinions?

A. I don't see why he didn't hear me; there was men beyond him heard me, they said.

— Since you have mentioned the men beyond him that heard you, don't you know that Pierce Walters was nearer to you than Holbrook was, didn't hear you?

A. I don't know, I never heard him say.

Q. Mr. Carbaugh, you have stated, and it has been stated here and you have admitted it yourself that that was a dangerous situation?

A. Yes, sir.

317 Q. That is true, isn't it?

A. Yes, sir.

Q. That bridge was between a tunnel, within forty feet of the west end of it, and a curve near the east end of it?

A. I don't know just how close the tunnel is, but it is something like forty feet.

Q. The distance is immaterial since you admit it was a dangerous place. You admit that, no matter if the tunnel was a mile away, and the curve was a mile away, it was a dangerous place, and you knew it, didn't you?

A. Yes, sir.

Q. You knew 15 was approaching that place and you knew that you had no time on it?

A. Yes, sir.

Q. You knew it was liable to come along there and that the maximum rate that it ran, if the engineer took a notion to do it, was forty miles an hour, didn't you?

A. Yes, sir.

Q. And you didn't know but what it would be running forty miles an hour?

A. No, sir.

Q. Do you know how long it took a train running forty miles an hour, how far it would go in a second?

A. No, sir, I do not.

Q. As a matter of calculation I will state to you that it will go fifty-five feet. Now, I want to know, do you consider a signal spoken by a man "Railroad," as you spoke that, a reasonably safe signal to give to men on a bridge situated as that was, enveloped in smoke?

By the COURT: I will object to that question myself.

Q. Is there any such signal as "Railroad" spoken loudly, by the human voice, provided for or required in any of the rules of the Norfolk & Western Railway Company?

Question objected to by counsel for defendant.

Objection sustained.

Q. "Railroad" is the signal given when you are working on bridges with a straight-away track in each direction, isn't it, and where you can see trains at a long distance?

A. That is the warning for men to get in the clear.

Q. And it is the ordinary warning used in ordinary situations, isn't it?

A. Yes, sir, for the men to get in the clear; that is the warning that we use for men to get in the clear.

Q. If I understand you correctly, you used that same warning without regard to the dangerous situation, or an ordinary situation; in other words, on the day of this accident, you used the same warning in a dangerous place that you had been using theretofore in an ordinary place; that is true, isn't it?

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A. Yes, sir; we used it in all places.

Q. In other words, the situation you are working in makes no difference to you, and it does not affect the character of the warnings you use at all, does it? You use the same warnings at all times and at all places: that is right, isn't it?

A. As a general thing, yes, sir.

Q. Do you happen to know anything about the rules of the Norfolk & Western Railway Company?

A. Yes, sir; I learned them.

Q. Where did you learn them?

A. I read the book of rules a time or two.

Q. I will ask you if you haven't signed a written statement in which you said that you were never furnished with a book of rules and never had it?

A. I never did have a book of rules.

Q. And I want to know if you haven't signed a written statement, all of which is written by you and signed by you, that you had never seen it?

A. I saw Mr. Anderson's book of rules, the foreman.

Q. I am not asking you what you have seen now. I am asking you if you didn't make a written, signed statement in which you said that you never had seen, or been furnished with a rule book?

A. I never have been furnished with a book of rules.

Q. Have you ever seen a book of rules except casually?

A. I saw Mr. Anderson's book of rules, is all.

Q. Did you ever read them?

A. Yes, sir. I read a sketch or two in them.

Q. What do you mean by that?

A. A page here and now, in regard to Master Carpenter or Roadmaster.

Q. Are you acquainted with the book of rules?

A. Yes, sir.

Q. To what extent?

A. What do you mean by that?

Q. To what extent are you acquainted with them? You said just now that you took it up and read a sketch or two in it?

A. Yes, sir, I read several pages in it.

Q. Do you mean to say that would make you acquainted with them?

A. That would make a man somewhat acquainted with them, yes, sir.

Q. Now, please look at that leaflet and tell me if you ever saw it, or ever read it. You don't have to read the whole thing over to say whether you ever saw it, do you?

A. No, sir.

Q. Well, I ask you if you ever saw it?

A. No, sir. I never saw it until I saw it here the other day, 319 that I remember of.

Q. I will ask you to read paragraphs six, seven and eight therein, and I will ask you if they do not, on their face apply to foremen?

A. "Foremen or others in charge of employees working on or about the tracks must instruct their men——"

Q. (Interrupting.) Are you able to read it?

Mr. McCORMICK: Alert.

A. "Alert, watchful, and to keep out of danger; and will take no responsible precaution——"

Q. (Interrupting.) Where is responsible precaution in that rule; where is there any word like "responsible" there?

A. "Reasonable precaution to see that all men working under them——"

Q. (Interrupting.) Where is any "them" there?

A. "All men working under their immediate supervision to see approaching——"

Q. (Interrupting.) To see what?

A. "To receive warning of approaching trains in time to reach a place of safety."

"When working on the track in place where approaching trains——"

Q. (Interrupting.) Where is the word "place" there; I see no such word?

A. "When working on the track in places——"

Q. It is places, is it not?

A. "In places where approaching trains can not readily be seen, because of——"

Q. Because of what?

A. I can not pronounce that word.

Q. That word is permanent.

A. "Permanent obstruction to the view, of——"

Q. Where is there any "of?"

A. "To the views."

Q. That is view and not views.

A. "To the view, or other obstruction, such for instance as for storms——"

Q. What is the first word?

A. "As for storms."

Q. That is not storms, that is fog.

A. "Fog, storms, snow, or engines of cars——"

Q. That is engines or cars, not "of cars."

A. "Extra precautions must be taken to warn the men of approaching trains."

"Foremen, watchmen and others in charge of gangs or squads of workmen must provide themselves with a whistle and should use the same in warning men when working in places where approaching trains can not readily be seen."

Q. Now, read No. 8.

A. "As an extra precaution, when necessary to place a watchman at some distance from the men at work on the track, or in such location——"

320 Q. That is not "has."

A. "That his signals may not be understood, additional



watchmen should be placed so that the signal can be passed to the man at work.

Q. Is that men or man?

A. "To the men at work, and return signal obtained."

Q. Is that men, or man?

A. "To the men at work, and return signal obtained. In case return signals are not received and understood the watchman must signal the train to stop."

Q. Now, as a matter of fact, you not only have never seen rules six, seven and eight until you came to the trial of this case, but when they were handed to you, you were not even able to read them without assistance, isn't that true?

A. I couldn't pronounce a word or two in it.

Q. There were words in it that you did not know what the words were, or what the words meant, isn't not that true?

A. I knew the meaning of it.

Q. Did you have any whistle?

A. I did not.

Q. It seems that the Norfolk & Western Railway Company thinks more of a whistle as a device for giving signals than the human voice; what do you think about that? Do you think it would beat your railroad?

A. I do not know of anything better than a man telling a man; a man hollering.

Q. You have just stated a little while ago that you could not reconcile the fact that Tom Holbrook heard you with the fact that you admit that he got on the track in front of fifteen, do you think that is very good evidence of the value of the human voice when a freight train is passing by a man who is using the voice?

Question objected to by counsel for defendant.

Objection sustained.

Q. One other question, and I am through with you. I have understood you to have distinctly stated to the jury that the warning you gave at all times and in all cases with reference to the dangers peculiar to any particular place, was always to holler "Railroad;" that is the only warning you used and you did not vary that morning with respect or reference to the situation of any particular place, but you used it always; that is true, is it not?

A. Yes, sir, I used that warning.

321 Redirect examination.

By Mr. McCORMICK:

Q. Was that an adequate and sufficient warning?

Question objected to by counsel for plaintiff.

Objection sustained.

Q. Now, you were asked to what extent you were acquainted with the rules, and you stated that you never had been furnished with a copy of the rules, but you had access to Mr. Anderson's rules?

A. I did.

Q. For how long a time did you have access to them?

A. Ever since I have been with them.

Q. Did you read them?

A. Not a great deal, but I have read a few pages in them several times.

Q. I mean so far as they apply to your work or your duties there?

A. Yes, sir.

Q. Now, I am coming to rules six, seven and eight, directly. Did you ever see that notice (indicating)?

A. Yes, sir.

— I refer to the notice now, headed "Norfolk & Western Railway Company, Form C. T. 307, Notice, Rules for the Government of Employees Working on or about Tracks," offered in evidence on yesterday. Where was that posted?

A. In Mr. Anderson's car.

Q. I forgot to ask you a question; did you ever see Mr. Holbrook read that notice?

A. I have.

Q. I read now from rules six of the leaflet: "Foremen, or others in charge of employees working at or about the tracks must instruct their men to be alert, watchful, and to keep out of danger; and will take all reasonable precautions to see that all men working under their immediate supervision receive warnings of approaching trains in time to reach a place of safety." Did you observe that rule that day?

Question objected to by counsel for plaintiff.

Objection sustained.

Defendant excepts.

By Mr. McCORMICK: In order to make up the record, I would like for the answer of the witness to appear therein, which would be "Yes, sir."

322 Q. Now, rule seven provides, that: "When working on tracks in places where approaching trains can not readily be seen, because of permanent obstructions to the view, or temporary obstructions, such, for instance, as fog, storms, snow, or engines or cars, extra precaution must be taken to warn the men of approaching trains." Were there any conditions existing there that day called for that rule?

Question objected to by counsel for plaintiff.

Objection sustained.

Mr. McCORMICK: We would like for the record to show that his answer would be "No."

Q. Now, you said that you had no whistle, was there any necessity for your having a whistle?

Question objected to by counsel for plaintiff.

Objection sustained.

Defendant excepts.

Q. Here is a question that I intended to ask you, and probably did ask you, thought I do not recall it, and that is, whether or not

the warning given by you of the approach of No. 92 was in time for everybody to clear the track and have the timbers cleared off?

A. It was.

Q. You told Mr. Werth that you knew where Mr. Holbrook was standing, and that you could take him there and show him that place today. When the photograph was taken were you on the ground at the time that was taken?

A. Yes, sir.

Q. Did you indicate to the photographer the place where Mr. Holbrook was standing?

A. Yes, sir.

Q. Look at photograph No. 3 and say whose picture that is there?

A. That is my picture.

Q. At what point were you standing with respect to where Holbrook was standing at the time of the accident, after he cleared?

A. At what point in the bridge was I standing?

Q. Where were you standing at that time, now, when that picture was taken and showing where Holbrook was standing at the time after he cleared the bridge?

A. I don't just understand exactly what you want.  
323 Where was I standing when I saw Holbrook standing there?

Q. No, that is not it; where was Holbrook standing with respect to where you are standing in that picture.

A. Right there.

Q. Now, on what girder is that?

A. That is the second one from the west end of the middle span. I believe.

Q. Then your picture there represents where Holbrook was standing at the time he cleared?

A. Yes, sir.

Q. Were you put in that position for the purpose of representing where Holbrook was standing at the time when you saw him clear?

A. I was.

By the COURT:

Q. He was at the bracket where you are shown in the picture?

A. Yes, sir.

(Witness stands aside.)

By Mr. McCORMICK: I understand that it is an admitted fact in this case that Mr. Holbrook had this leaflet and that you (Mr. Werth) got it out of his trunk?

By Mr. WERTH: Yes, sir. I do not admit that I got it out of his trunk, but I admit that he had that leaflet.

By Mr. McCORMICK: In that connection we desire to introduce Rule No. 1 in that leaflet.

By Mr. WERTH: I object to that because it states a legal conclusion as to what is the duty of a man and that is a matter of law, and I suppose they intend to use it in conflict with the rule that he

had a right to rely upon the performance of the duties disclosed or declared in six, seven and eight. He had a right to rely on those.

Objection overruled.

Mr. McCORMICK: Now, I will read the rule, which is as follows:

"No. 1. It is the duty of every railway employee working on or about the tracks of this company to exercise great care to avoid injury to himself and others, and nothing in these rules is to  
324 be construed as to relieve any employee from performing his full duty in that respect."

By Mr. McCORMICK: We offer also rule No. 3.

Plaintiff objects.

Objection overruled.

By Mr. McCORMICK: The rule is as follows:

"No. 3. On the approach of a train, employees who are working on or about the tracks must move to a place of safety.

They must not walk nor stand on the track, except when necessary for the proper performance of their duties."

By Mr. McCORMICK: We also offer Rule No. 15, which is as follows:

"No. 15. Trains will be run in either direction, on any track whenever necessary or expedient and workmen will be governed accordingly."

GEORGE A. SMITH was sworn as a witness for the defendant, and testified that he is a locomotive engineer, employed by the N. & W. Railway Company, and was so employed on the 4th day of January, 1915, and on said day was running engine No. 593, hauling train Second #15; that he took this train at Bluefield, and ran it to Williamson; that he had an order requiring said train to be run as second #15, and he identified said order, and read it as follows: "Second No. 15 will run two hours and forty minutes late, Bluefield to Davy, two hours and thirty minutes late Davy to Williamson, Eng. 593 will run as second No. 15 Bluefield to Williamson;" that he recalled passing over the bridge at Pando which is known as Bridge 899-A, and that No. 92 was on the east bound track passing him as he crossed said bridge; could not say exactly where his engine passed engine of No. 92, but believes it was east of said bridge; that he blew the road crossing signal two long and two short blasts about bridge 899; that bridge 899 was about 500 or 600 yards east of bridge 899-A; that he believes his train was making about 30 or 35 miles an hour when he crossed bridge 899-A; that at bridge 899-A he saw one man standing on the right hand side about the bridge  
or on the ground; could not tell who he was, and saw no  
325 one else, and did not know his engine struck Mr. Holbrook.

Heard the next morning at Bluefield that his engine struck some one on that bridge. Walter Kirby was his fireman that day. Witness was looking out at bridge 899-A. There was a good deal of smoke on the bridge at the time; there is always smoke there when a train is passing and coming through that tunnel, and there was not more than usual when this is the case.

## Cross-examination by Mr. WERTH:

There was enough smoke to prevent his seeing a man on the track. Witness, as near as he can remember, was 5 minutes late at Davy; that he had made up five minutes since leaving Bluefield, gained 5 minutes on the schedule. Davy is about 1 mile west of bridge 899-A, and 44 miles west of Bluefield. The schedule time from Bluefield to Davy is 1 hour and 45 minutes. The schedule shows the distance from Welch to Davy at 6 6/10 miles; that is the train schedule used by trainmen. The passenger schedule shows the distance at 8 miles and the time as 13 minutes. Believes that would show a schedule rate of speed somewhere along about 36 8/10, or nearly 37 miles an hour. They were allowed to run 40 miles per hour. Was not much behind that day. Just a few minutes late on his schedule, and gained 5 minutes, as stated, from Bluefield to Davy. Believes the schedule of 40 miles per hour provides for all stops.

## Redirect:

The schedule furnished to the trainmen to run by shows 6 6/10 miles between Welch and Davy. The schedule which he believes is furnished to passengers and the public shows this distance as 8 miles. He thinks the correct distance is 6 6/10 miles, and in making this distance in the time of the schedule, 13 minutes, witness supposes would require 30 or 35 miles an hour.

H. C. WELLER was sworn as a witness for the defendant and testified that he is Superintendent of the Pocahontas Division of the Norfolk & Western Railway Company; that the accurate distance between Welch and Davy on his division is six and about seven-tenths miles; that by the time table the distance is given as six and eight-tenths miles; that the discrepancy was caused by revising the line between these points which cut down the distance or shortened it and it was corrected when the time table for employees was gotten out but not corrected in the passenger schedule or time table for the public, which is eight miles and must be wrong; that the schedule for the public was not correct in this particular but that the time table furnished employees was correct, which showed six and eight-tenths miles as the distance between said points. On cross-examination this witness testified that he could not tell the reason why the correction had not been made in the time table for the public but had been made in the time table for the employees; that conductors did not pull mileage according to the passenger schedules and that conductors did pull mileage according to the time tables furnished employees, that is to say, according to the actual mileage.

C. D. HALLER, sworn, for Defendant.

Direct examination.

By Mr. McCORMICK:

Q. Mr. Haller, something has been stated here about directions or instructions given by you to the railroad employees as to whether or not they should talk to Mr. Werth, counsel on the other side of the case. Will you tell the jury just what you did say to the employees?

A. Several of them asked me if they had to tell Mr. Werth what they knew. I told them that they could do as they pleased about it, that they did not have to talk to Mr. Werth unless they wanted to, nor did they have to talk to our attorneys unless they wanted. And I would like to go further and state why I told them that. On the 28th day of May, I went to the camp, I was given this case to investigate and prepare for trial, if it was necessary to go to trial, as there was some talk of a compromise. I took the papers and went out to the camp, and Mr. Carbaugh complained to me about the way Mr. Werth had treated him at Graham, that he had tried to get him to slip his foreman's rule book and send it to him by mail and that he would return it to him by registered mail under personal cover and no one would ever know anything about it. I didn't say anything then, but I came back to Roanoke, and on the tenth of this month I went to Mullins Starting to see about where the card was posted in the car, and whether it was posted, or not, and at that time——

By the COURT: I think all this is unnecessary.

By Mr. WERTH: I thought so, too, but I did not care to object to it.

WITNESS: I want to put myself right before the court  
327 and the jury.

By Mr. McCORMICK:

Q. Did you ever direct or instruct any one of the company's witnesses not to talk to Mr. Werth?

A. No, I told them they could do it, or not, as they pleased.

Q. You told them if they choosed to do so, they need not talk to him, if they did not want to do so, and the same was true of counsel for the railroad company?

A. Yes, sir; and I further told them that when they went on the witness stand, that I wanted them to answer Mr. Werth's questions the same as they did our attorneys' questions.

Cross-examination.

By Mr. WERTH:

Q. How many different witnesses did you tell that to?

A. I don't know, but there were several in the car when *when* I told them.

Q. How many different witnesses have you told that to here in Roanoke?

A. I told the same ones, after they had asked me the same thing when they got here.

Q. They kept on asking you that, did they?

A. They asked me there and here.

Q. They kept on asking you that?

A. They asked me twice.

Q. Did they ask you more than twice?

A. No, sir.

Q. And each time they asked you if they could refuse to talk to Mr. Werth, and each time you told them they didn't have to?

A. Unless they wanted to.

Q. Do you think it is proper for a witness who is summoned to testify in court to decline to talk to counsel for a litigant in court?

A. I think it is if he sees it is not proper to talk to him.

Q. I am asking you, do you think it right and proper not to do it?

A. It depends altogether on how the witness is treated.

By the COURT: I do not think that is proper, Mr. Werth.

Q. You say that Mr. Carbaugh told you—

By Mr. WERTH: Your Honor, can I go into that matter  
328 about what the witness said in regard to Mr. Carbaugh telling him that I tried to get him to slip a rule book to me?

By Mr. McCORMICK: I understood the court to strike it out and direct the jury to disregard it.

By Mr. WERTH: What did you put it in here for then?

Mr. McCORMICK: We did not ask for it.

WITNESS: I asked for permission to explain it.

By Mr. WERTH: I do not think that statement ought to be put in here, that I tried to slip a rule book from Mr. Carbaugh.

By Mr. McCORMICK: You can make a statement in regard to it, under oath, or not, if you want to.

By Mr. WERTH: I can not act as counsel and witness both in the case, and I am the only counsel in the case.

By the COURT: I think he should be allowed to finish his statement of what took place at the camp ear and you can cross examine him, but I do not think it has anything to do with this case, Mr. Werth.

By Mr. WERTH: I do not think it has anything to do with this case either—stand aside.

WITNESS: I asked permission to explain it.

By Mr. McCORMICK: I know you did.

Witness stands aside.

End of testimony for both plaintiff and defendant.

Which was all the evidence introduced in this case.

And thereupon, at the end of the testimony for both plaintiff and  
329 defendant, the defendant by counsel moved the Court to instruct the jury to find a verdict for the defendant, which motion the Court overruled and gave the following reasons therefor:



"By the COURT: The motion of defendant for an instructed verdict cannot be sustained if negligence on the part of defendant can be reasonably inferred from the evidence for the plaintiff.

Witness Harrison (pages 35, 43, 44, 56, 76 and 78 of the stenographer's transcript of testimony) says that when he last saw Holbrook the latter was stepping up to and looking at the last 'block.' The block was at that time laying across the rails of the west bound track. On page 57 of transcript he says that second No. 15 came around the curve within thirty seconds or maybe a minute after he last saw Holbrook. The smoke hid Holbrook from Harrison's view.

It is not for the court to say, as a matter of law, or as a question of fact too clear for honest minds not to differ about it, that Holbrook had time—being, as he then was, enveloped in smoke, and on a bridge with many open spaces—to have cleared the block and also to get himself into a place of safety before second No. 15 was on him.

Especially is this true in view of Harrison's evidence (page 46 of stenographer's transcript) that he thought No. 15 had struck the block and killed Holbrook with it. Evidently this witness thought, at the time of the accident, that Holbrook had been killed while he was trying to get the block off the track and before he had succeeded in doing so. It is true that he subsequently found the block laying outside of the guard rail, as though a railroad man had cleared it; but still it is a reasonable inference from his entire testimony that Holbrook was killed after he had gotten the block off the track but before he could get himself to a place of safety.

In this connection it must be remembered that the place where the train could be seen coming around the curve, from Carbaugh's situation near the east end of the bridge, to the centre of the bridge was from 304 feet (plaintiff's evidence) to 564 feet (defendant's evidence). A train traveling at the rate of 35 miles an hour would travel these distances in about 5 and 11 seconds, respectively. Now, if Holbrook, with only thirty seconds, or even a minute, before the train would reach him, had yet to remove the block of timber, and had yet, in the smoke, to avoid the open spaces and find a floor beam or pillar-top to get himself to a place of safety, it seems to me to be a jury question whether or not the duty defendant owed him had been performed. If 2nd 15 had been flagged, or if a lookout had been stationed near the west end of the cut, Holbrook would have escaped.

330 Treating Harrison's evidence as true, it seems to me that it is for the jury to determine whether or not the defendant was negligent in not taking these precautions.

For these reasons the motion of defendant for an instructed verdict in its favor will be overruled.

#### Exc. 1.

To which ruling and action of the Court in overruling the defendant's motion to instruct the jury to find a verdict for the defendant, the defendant by counsel then and there at the time excepted.

And thereupon the Court gave the jury at the instance of the plaintiff the following instructions:

"1.

"The court instructs the jury that if they believe from the evidence that Foreman Carbaugh was negligent as charged in any one of the counts of plaintiff's declaration, and that such negligence either wholly or partly proximately caused the death of W. T. Holbrook in the manner alleged, then the court instructs you that the defendant is liable to the same extent as if it had been personally guilty of such negligence instead of Carbaugh; in other words, Carbaugh was, in law, the company at the time and place alleged, and his negligence, if any, was the defendant's own personal negligence.

2.

The court further instructs the jury that if they believe from the evidence in this case that the death of said Holbrook, at the time and place alleged, resulted proximately in whole or in part from the negligence of any of defendant's other agents or employees, as set out and alleged in any count of plaintiff's declaration, then the court instructs you that defendant is liable in damages for the death of said Holbrook to the plaintiff, for the benefit of said Holbrook's surviving widow and infant children."

Exc. 2.

To the giving of the plaintiff's said instruction No. 2 set out in full above the defendant at the time by counsel objected on the ground that it is uncertain, vague and indefinite; because there is no evidence in the case upon which to predicate it; and  
331 because there is no evidence in the case tending to prove negligence of any other agent or employe of defendant Company than Carbaugh as the proximate cause of plaintiff's injury; which said objection the Court overruled and gave said instruction as aforesaid, to which ruling defendant by counsel then and there at the time excepted.

"3.

"The court instructs the jury that it was the duty of Foreman Carbaugh to exercise ordinary and reasonable care to provide such timely and adequate warning for the men on the bridge of the approach of second section of train No. 15 as would enable them to have a reasonable opportunity under the circumstances to reach a place of safety without injury.

Ordinary care, as used in this instruction, is a relative term, having reference to all of the facts, circumstances and conditions of the particular case, and is that degree or standard of care, diligence and skill which is generally and customarily used and observed by men of ordinary prudence conducting a similar business under like facts, circumstances or conditions.

Any failure on the part of said Foreman Carbaugh, if any there was, to exercise such degree of care as is above stated, if it approximately wholly or partly caused or contributed to the death of W. T. Holbrook as alleged in any one of the counts of plaintiff's declaration, the court tells the jury, makes the defendant company guilty of such negligence as will entitle the plaintiff to recover damages in this case.

## 4.

The court instructs the jury that contributory negligence, if any, on the part of W. T. Holbrook cannot entirely defeat a recovery by the plaintiff. The burden of proving contributory negligence rests on the defendant, and is borne only by a preponderance of the evidence.

If you conclude that Holbrook's own negligence contributed proximately to his death, the result of such conclusion is that plaintiff shall not recover full damages but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both. And this is true because the statute directs that the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

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## 5.

The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding \$40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have

been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed; and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

(2) The jury will also take into consideration the care, attention, instruction, training, advice and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said  
333 children, and include the pecuniary value of the same in the damages assessed."

To the giving of the plaintiff's said instruction No. 5 set out in full above the defendant at the time by counsel objected on the ground that it takes in elements which do not properly enter into consideration by the jury of damages, if any, plaintiff is entitled to recover; because the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related; which said objection the Court overruled and gave said instructions as aforesaid, to which ruling defendant by counsel then and there at the time excepted.

And at the instance of the defendant the Court gave the following instructions:

"A.

"The court instructs the jury before the plaintiff can recover she must establish her case as she has laid it in the declaration, and must show to the jury to its satisfaction, by a preponderance of affirmative evidence that the defendant has been guilty of negligence as charged in said declaration, and that it was the proximate cause of the injury. A mere probability that the defendant has been guilty of negligence will not be sufficient to justify a verdict of a jury for the plaintiff. The mere fact that it is more probable that the act of the defendant company caused the injury which resulted in the death of the plaintiff's intestate than some other cause, will not be sufficient. Negligence is a question of fact and must be established by affirmative evidence, and a mere probability or conjecture that the defendant has been guilty of negligence will not warrant or justify a verdict.

B.

If the jury believe from the evidence that the trains on the 4th day of January, 1913, including freight and passenger, were run in the usual and ordinary way in the operation of its road by the defendant company, and that train No. 15 was divided into two sections, and that this was usual and ordinary, and that the first section carried signals warning everybody on the bridge that the

second section would come along, then the mere fact that it came along two hours and forty minutes, or even three or four hours late, is not an act of negligence. And, further, if they believe from the evidence that it was usual and ordinary for trains  
 334 when passing through the tunnel to carry along with them volumes of smoke which settled upon the bridge, this was not an act of negligence, and the court instructs the jury that, in addition to the duty resting on the foreman, it was also the duty of the men on the bridge, in so far as their other duties under the circumstances permitted, to look out for these approaching trains, and to guard, in so far as their other duties permitted, against the danger of the obscurity to the vision created by the smoke.

## D.

If the jury believe from the evidence that on the approach of No. 92, a double-header freight train, Carbaugh called out 'Clear up!' and that he meant by this that all timbers on the track must be cleared off, and that the men themselves must get clear of danger, and if they further believe that Holbrook understood this to be true, then this warning was sufficient to have required the men at work on the bridge to have cleared off the track, and to have gone to a place of safety, if the warning was given in time for them to get to such a place. And this is true notwithstanding the fact that no flagman was sent out, no torpedo placed, no whistle blown, or no warning given to the engineman, if by word of mouth the men were warned to get out of a place of danger in time for them to get out."

The Court on its own motion gave the following instruction:

## "E.

"The court tells the jury that it is of the opinion that there is no evidence in the case supporting a theory that Holbrook, after having gotten into a place of safety, left the same because he discovered that a piece of timber had been left on the west bound track, or that he went back *back* there to remove a piece of timber. But the court does not by this mean to imply a belief on its part one way or the other as to whether or not Holbrook was in a place of safety and went back on the track."

And at the instance of the defendant the Court gave the following instructions:

## "G.

"The Court instructs the jury that if they believe from the evidence that when train No. 92 approached bridge No. 899-A  
 335 Carbaugh warned the men under him, including Holbrook, of the approach of said train, and ordered them to clear up, and that they had sufficient time, under the circumstances as disclosed by the evidence, after they had such warning and received such order to have cleared up and gotten to a place of safety before the second section of train No. 15 came along on the west bound

track, and that Holbrook did not get into the clear, although he had time to do so after such warning, and after clearing the west bound track of the timber upon said track, then such failure on his part was the proximate cause of the accident, and that it was his negligence, and the plaintiff cannot recover in this action.

### I.

The court instructs the jury that one working on or near a railroad track or on a bridge over which trains are frequently passing, is bound at his peril to use ordinary care for his own protection, and to make such reasonable use of his senses of sight and hearing as the circumstances permit, in order to detect the approach of trains, and that a disregard of such duty is negligence, and the fact that he was an employe and was working on the bridge or track under a foreman who was present would not relieve him from exercising ordinary care under the circumstances for his own safety, and that he had no right to rely wholly on the railroad company to protect him from passing trains. It is also true that plaintiff's intestate did not assume the risk of negligence, if any, on the part of the foreman."

And the Court of its own motion gave the following instructions:

#### "Instruction No. 1.

"Your first duty on reaching the jury room will be to elect a foreman. He votes as one of you. He has not only the duty of drawing up and signing your verdict, but also the very important duty of acting as your presiding officer, as the chairman and moderator of the meeting. He should see to it that only one member of the jury has the floor at one time, and that the member who is on the floor be not unduly interrupted. You should avoid several different discussions at the same time, and it is much the best practice that each juror be given opportunity to fully express his views with the undivided attention of all of his fellow jurors.

In your deliberations I advise you strongly to be most temperate of speech and most courteous of manner. If one juror  
336 should even imply that some other or others of the jury are obstinate, a very unnecessary obstacle will be placed in the way of what might otherwise be an agreement that is utterly satisfactory to all of you.

(The Court stated to the jury that the next instruction embodied the language of the United States Supreme Court — *Allen v. United States*, 164 U. S., 492, 501-2 — and referred to a criminal case, but was equally applicable to this case.)

#### Instruction No. 2.

"These instructions were quite lengthy and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of

his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

While, undoubtedly, the verdict of the jury should represent the opinion of each individual member, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his own opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

Which said instructions were all of the instructions given to the jury.

337 Thereupon, after hearing arguments of counsel, the jury was sent to their room to consider their verdict, sometime after which they returned in Court with a verdict in words and figures as follows:

"We, the Jury find for the Plaintiff the sum of \$25,000—twenty-five thousand dollars.

(Signed)

A. L. FEATHER, *Foreman.*"

And thereupon the jury was discharged from this case.

The defendant thereupon moved the Court to set aside the verdict of the jury, which motion the Court overruled and entered judgment for the plaintiff and against the defendant upon the said verdict; and filed August 30th, 1913, an opinion upon said motion, which opinion is hereby made a part of the record as follows:



"HOLBROOK'S ADM'R

v.

N. & W. Ry. Co.

*Opinion on Motion to Set Aside the Verdict.*

(1) Opinion Evidence on Negligence.

The first exception taken by the defendant which seems to justify mention is found near the beginning of the cross-examination of Gregory (p. 283 of transcript). At the instance of counsel for defendant I had repeatedly ruled out exactly similar questions asked by plaintiff's counsel. (See pp. 38, 51, 248, 253, 255.) The reason is that the jury was quite capable of determining whether or not a flag should have been put out. See *R. Co. v. Kellogg*, 94 U. S., 469; 472-3; *Roanoke v. Shull*, 97 Va., 419, 422; 3 *Wigmore Ev.*, secs. 1918, 1921. Several similar rulings (see p., 385, 386, 396, 505) were subsequently made, but they need not be mentioned in detail.

Moreover, having invoked the rulings made against the plaintiff, the defendant was estopped to ask for a reversal of such rulings. *R. Co. v. Blandford*, 105 Va., 373, 387; *Bogk v. Gassert*, 149 U. S., 17, 25; 1 *Wigmore Ev.*, sec. 15, p. 47; 43 W. Va., 769, 28 S. E. 721.

338 (2) Evidence of Wages of Foreman of Carpenters (p. 317).

Over objection of defendant I admitted evidence of the wages received by a foreman of bridge carpenters. While it is a matter of common knowledge that in railroad service promotion is a reasonable probability, it is not a certainty, and this ruling was probably erroneous. This error, however, was cured by instruction No. 5, subsec. 1, wherein the jury was instructed to base Holbrook's prospective earning capacity on the wages he was receiving at the time of his death. This instruction not only cured the error above mentioned, but, if it had not been for the said error, it would have gone too far in favor of the defendant. While 'speculation of possibilities' is forbidden, the authorities parenetically all admit that reasonable probabilities as to future earning capacity are to be considered. (1 *Sedgw. Dam.* (9th ed.) sec. 574 et seq.; 2 *Joyce Dam.* sec. 877; *R. Co. v. Foxworth*, 14 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149, 158-9; *McHugh v. Schlosser*, 159 Pa. St. 480, 39 Am. St. 699, 703; *Countryman v. R. Co.*, 166 N. Y. 201, 59 N. E. 822, 82 Am. St. 640 645-6; note 12 Am. St. 379; *R. Coy. Ormond*, 64 Tex. 485; 15 *Century Digest—Death*—secs. 109, 112, pp. 2462, 2468; 7 *Decennial Digest—Death* secs. 86 and 95 (3).

If it is a reasonable probability that decedent would have earned more in the future, had he lived, than he was earning at the time of his death, there can be no good reason for excluding such probability from the consideration of the jury, or for pinning them down to the wages earned at the time of the accident. It has been fre-

quently held that the jury should consider the chances of death, of loss of employment from sickness or financial depression, etc., etc. (*Mansfield Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662, 664; *Duke v. R. Co.*, 172 Fed. 684, 691; *R. Co. v. Roach*, 64 Ga. 635; *Harrison v. R. Co.*, 115 Calif. 156, 47 Pac. 1019; *Oakes v. R. Co.*, 95 Mo. 103, 49 Atl. 418; 2 Sedgw. Dam. (9th Ed.) 580*a*). And if so, certainly reasonable probabilities of future increase of earnings is equally matter proper for consideration. The entire subject is to some extent speculative, and must necessarily involve mere probabilities. So long as the probabilities are reasonable, the jury may and should consider them.

### (3) Accumulations of Decedent.

On the cross-examination of C. W. Anderson (p. 321-2) and on the examination of Stallard (pp. 325, 326-7, 328) defendant objected to evidence of accumulation of property by Holbrook. In 2 Sedgw. Dam. (9th ed.) 574*a* it is said that the jury should take into consideration 'the age and expectation of life of the  
339 deceased, his ability and disposition to labor, his capacity to earn, and his habits of spending and saving.' In 13 Cyc.  
357, it is said:

"And the better rule is that evidence is likewise admissible as to the amount of property which decedent had accumulated, as bearing on the question of damages, and as tending to show the reasonable expectation of pecuniary benefit which would have accrued to the beneficiaries from the continuance of his life."

To the same effect see 2 Joyce Dam. secs. 886, 880.

### (4) The Verdict.

The mortality tables and the state of health and the habits of the decedent are admissible simply in order that the jury may estimate, very roughly, the probable duration of life of decedent had he not been killed. The average expectancy of life of a man 38 years is 29 plus years. As Holbrook was above the average in health, of fine physique and of most excellent habits, the jury had a perfect right to assume that his expectancy was considerably greater than the average. But for the present purpose, in default of any better guide, I shall assume that he had only the average expectancy. To arrive, even approximately, at the amount that Holbrook, if he had lived out his expectancy, could and would probably have expended in money for the benefit of his family annually is not free from difficulty. Under the evidence, without regard to any possibility of future increase of wages, he could have expended on his family, or have invested for their ultimate benefit, as much as \$750 per annum. But I shall use \$700 for my calculations, as probably being nearer to the actual figure. We are now brought to a more difficult question. Is the pecuniary loss now under consideration to be estimated on the cost of an annuity or according to the present (commuted) value of the sum which at 6 per cent per annum net would yield \$700 per annum? The Supreme Court (*R. Co. v. Putnam*, 118

U. S. 545, 554) has ruled that evidence of the cost of an annuity is admissible in cases such as this is. If such evidence is admissible it necessarily follows that the court can not say that a verdict is excessive which is supported by such evidence and allows no more than the cost of an annuity based on the proper data. To illustrate: Assume that there had been no beneficiary in the case at bar other than the widow and that the verdict had been for just the cost of an annuity of \$700 per year to one aged 38 years. The evidence

340 of the cost of such annuity being admissible, I can see no right in the court to regard such verdict as excessive. The ruling of the Supreme Court above cited is probably based on the fact that many beneficiaries entitled to damages for wrongful death are lacking in the experience, acumen and business judgment necessary to make money earn anything like 6 per cent. net per annum. To shrewd, successful men of business the present value of a sum which would at 6 per cent net per annum yield a stated income, would in Mrs. Holbrook's hands yield greatly less. Worked out under Code 1904, sec. 2281 (which does not apply to a case like this, and is at most only analogous) the present value of the sum which would at 6 per cent. net yield \$700 per annum ( $\$12,239 \times \$700$ ) is \$8,567. The cost of an annuity of \$700 issued by the better class companies to a man aged 38 years is \$13,388. As to so much of the verdict as does not represent the money cost of tutelage to the children, I must conclude that \$13,388 is not excessive.

Under *R. Co. v. Vreeland*, 227 U. S. 59, 71, 73; *R. Co. v. Mackey*, 157 U. S. 72; *Sedgw. Dam.* (9th ed.) sec. 577; 2 *Joyce Dam.* sec. 889, 13 *Cyc.* 371; *R. Co. v. Duke*, 192 Fed. 306, 309; note 12 *Am. St. Rep.* 382; *R. Co. v. Hoist*, 100 *Am. St.* 65; *Comrs. vs. Legg*, 47 *Am. Rep.* 390; *R. Co. v. Mathis*, 113 *Am. St.* 891; a distinct element of recovery is the pecuniary value to the infant children of the instruction and physical, intellectual and moral training which Holbrook, had he lived, would have supplied. And in view of the explicit language of the Supreme Court above mentioned I can not follow the Michigan rule in *Walker v. R. Co.*, 69 *N. W.* 1114, 62 *N. W.* 1032. It seems probable from the authorities that the jury are not tied down to a computation of the cost of employing tutors to render such service. But in testing a verdict to ascertain if it be excessive, it would seem admissible, even if not necessary, to estimate on the theory of the cost of tutelage, in so far as that is practicable. Accurate computation in this respect is impossible, but we can estimate with a sufficient approximation to accuracy to learn if the verdict is excessive. It should here be said that, to supply the place of the father, this tutelage must continue as to the youngest child for some twenty years. An instructor or tutor of intelligence and education equal to that of the decedent could probably be secured at a very moderate salary. But the salary required to secure a tutor of such character that he would, conscientiously and persistently, lend to his task the efficiency which his father's love and ambition for his children would have supplied would certainly not be small. It is not mere book learning that is involved. That can and will be acquired to some degree in the public schools. The

341 father would have supplied to the intellectual and moral training of his children an unwearied, long-continued and most conscientious effort, inspired not only by his love for them, but by his evidently strong ambition for their success in life. The children have lost the guidance of an intelligent, conscientious and ambitious father. To supply this loss the salary usually paid to a young woman school teacher would not suffice. The children are entitled to enough to secure the services of a man, and of a man of such character and disposition that he would—in so far as intellectual and moral training are concerned—supply the place of the father. If there be any accuracy whatever in the method I am using to test this verdict, the jury may be assumed to have allowed (\$25,000 — \$13,388) \$11,612 as the sum sufficient to secure competent tutelage for the children. Of course in so saying, it must be borne in mind that the jury were justified in using a higher figure than \$700 as the probable annual income and in assuming that Holbrook's expectancy of life was greater than the average. However, let it be assumed that \$11,612 represents the part of the verdict allowed for tutelage of the children. While the cost of this item will be greater for the next few years than later on, still the youngest child was only one year old at the time of Holbrook's death. For twenty years yet there will be occasion for instruction and training for this child. The sum of \$11,612 represents the cost of an annuity for 20 years of just about \$715, or a trifle less than \$60 per month. If it be proper to use the cost of an annuity here, as in estimating the former element of damage, the jury may properly be assumed to have reasoned that the cost of tutelage would have amounted to about \$60 per month for twenty years. I seriously doubt if this sum is sufficient; but at the least the award of this sum seems to me proof against a charge that it is excessive. I am further of opinion that there is the same reason for allowing the cost of an annuity of an amount sufficient to cover the cost of tutelage as there is for allowing it as damages for the loss of support. It may be urged that the cost of tutelage allowed should be small because Holbrook was usually with his children only for about twenty-four hours per fortnight. If it be assumed that this would have continued throughout the minority of his children, still it is to be remembered that the children were in the father's thoughts when he was not with them. He gave them the benefit of almost constant thought—as such a father naturally would do. A tutor employed to be with the children for only a few hours once in two weeks might be secured at less than \$60 per month. But to secure one who would give to his charges the thought and take in them the interest their father did, the amount allowed by the jury is not excessive. It is further to be remembered that Holbrook

342 bought property in Bluefield in order that he might be with his children more frequently.

There is another and simpler method of testing the verdict. The jury under all of the authorities had a right to base their verdict on the supposition that Holbrook's earnings, and hence his pecuniary value to his family, would in the future, had he lived, have

been considerably greater than \$700 per annum. If they estimated his probable future earnings at \$1,000 or even \$1,200 per annum, it can not be said that they were unjustified by the evidence. The cost of annuities at these figures are respectively \$19,127 and \$22,952. (Rhodes p. 349.) Add even a most slender allowance for tutelage to either of these sums, and the amount fixed by the jury can not be called excessive.

I have examined a number of cases in which awards of damages have been held excessive, but without learning anything of value. In the nature of things each case must depend on its own circumstances. In some of the older federal cases I find the idea advanced that \$10,000 should be the maximum in case of death because this is the statutory limit fixed by many of the states. The right of action here is given by a federal statute. If Congress had intended a limit on the compensation to be awarded in case of death it would have expressed, or at least have indicated, such intent. The state statutory limitations on recovery in case of death are remnants of a legislative policy differing widely from the present federal legislative policy, indicated by the Employers' Liability Act and the Safety Appliance Act. The policy underlying the federal statute law in regard to injuries to employees in interstate commerce is inspired by the modern theory that it is wisest that the losses usually caused by injuries to such employees should be borne by the employer (and ultimately by the public) rather than those least able to bear them; and that compensation, where allowed, should be full compensation. Except for the implied power of the court, under the common law, to set aside a verdict so large as to show that it is the result of partiality, passion or prejudice, there is nothing in the federal statutes that seems to me to authorize a trial judge, in an action under the Employers' Liability Act, to treat a verdict in a case of wrongful death, as excessive because much larger in amount than the maximum allowed by some state statutes.

The motion to set aside the verdict must be overruled and judgment entered in accordance with the verdict.

HENRY C. McDOWELL,  
*District Judge.*

Aug. 30, 1913."

343 And to save the benefit of defendant's exceptions then and there at the time taken as above set out, defendant tenders this its bill of exceptions, while the said court is still in session, and prays the court to certify the evidence, and the court certifies that this bill of exceptions contains the evidence and all the evidence introduced before the jury by the parties at the trial of the issues herein, and all the instructions given to the jury, which bill of exceptions is now signed, sealed and made a part of the record in this case, which is accordingly done, this 14th day of October, 1913.

HENRY C. McDOWELL, [SEAL.]  
*District Judge.*

In the District Court of the United States for the Western District of Virginia.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Plaintiff,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, Defendant.

*Assignment of Errors.*

The defendant in this action, Norfolk and Western Railway Company, in connection with its petition for a writ of error makes the following assignment of errors which the defendant avers occurred upon the trial of the case, to-wit:

First. The Court erred in giving the following instruction on behalf of the plaintiff to the jury, known as "Plaintiff's Instruction No. 5," as shown by Bill of Exceptions, which instruction is as follows:

"Plaintiff's Instruction No. 5.

The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for  
344 their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding \$40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as herein-after explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed; and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health,

habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

(2) The jury will also take into consideration the care, attention, instruction, training, advice and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

Defendant at the time objected to this instruction because it takes in elements which do not properly enter into consideration by the jury of damages, if any, plaintiff is entitled to recover; because the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related.

345 Second. The Court erred in giving on behalf of the plaintiff the following instruction, known as "Plaintiff's Instruction No. 2" as shown by Bill of Exceptions, which instruction is as follows:

"Plaintiff's Instruction No. 2.

The court further instructs the jury that if they believe from the evidence in this case that the death of said Holbrook, at the time and place alleged, resulted proximately in whole or in part from the negligence of any of defendant's other agents or employes, as set out and alleged in any count of plaintiff's declaration, then the court instructs you that defendant is liable in damages for the death of said Holbrook to the plaintiff, for the benefit of said Holbrook's surviving widow and infant children."

Defendant at the time objected to this instruction on the ground that it is uncertain, vague and indefinite; because there is no evidence in the case upon which to predicate it; and because there is no evidence in the case tending to prove negligence of any other agent or employe of defendant Company than Carbaugh as the proximate cause of plaintiff's injury.

Third. The Court erred in not sustaining the motion made by counsel for defendant, as shown by Bill of Exceptions, that the Court direct the jury to return a verdict in its favor made upon the conclusion of the introduction of all of the testimony introduced upon the trial of the case.

Wherefore, the defendant prays that the judgment of the District Court may be reversed.

THEODORE W. REATH,  
McCORMICK & SMITH,  
*Attorneys for Defendant.*



346 *Memorandum Required by Rule 14, Section 7, of the Rules of the Circuit Court of Appeals.*

NORFOLK & WESTERN RAILWAY COMPANY, Plaintiff in Error,  
vs.  
SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Defendant in Error.

I, Williams V. Martin, Deputy Clerk of the District Court of the United States for the Western District of Virginia, at Roanoke, Virginia, do hereby certify as follows:

October 14, 1913, a petition for a writ of error was filed in this case. On the same day the order allowing writ of error was made and entered. On the same day a Writ of Error was issued by Stanley W. Martin, Clerk. On the same day the Citation in this case was issued and service of same accepted by defendant in error by counsel.

October 21, 1913, a bond for thirty thousand and three hundred dollars (\$30,300.00), with the United States Fidelity and Guaranty Company, a corporation, as surety, was presented to the Court by plaintiff's counsel and approved and filed.

All of the original papers mentioned in this memorandum have been sent to the Clerk of the Circuit Court of Appeals, at Richmond, Virginia, as required by said Rule of Court, 14, section 7.

Given under my hand this — day of November, 1913.

[Seal of Court.]

WILLIAMS V. MARTIN,  
Deputy Clerk U. S. District Court, Roanoke, Virginia.

347 & 348 *Clerk's Certificate.*

UNITED STATES OF AMERICA,  
Western District of Virginia:

I, Williams V. Martin, Deputy Clerk of the District Court of the United States for the Western District of Virginia, at Roanoke, Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings of the District Court of the United States for the Western District of Virginia, made up in accordance with the stipulation of counsel as to the papers to be included in the transcript, filed October 28, 1913.

In testimony whereof, I hereunto set my hand and affix the seal of the said District Court this — day of November, 1913.

[Seal of Court.]

WILLIAMS V. MARTIN,  
Deputy Clerk U. S. District Court, Roanoke, Virginia.

349 On the same day, to-wit, November 19, 1913, original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation, is certified up under Sec. 7 of Rule 14.

Same day, original exhibits, (rules &c., blue print, photographs &c.) are certified up. Same day, appearance of Marshall McCormick, Roy B. Smith, Theodore W. Reath, and F. Markoe Rivinus, is entered for the plaintiff in error. November 21, 1913, the appearance of William H. Werth, is entered for the defendant in error. December 15, 1913, twenty-five copies of the printed record are filed.

*Motion of Defendant in Error to Dismiss Writ of Error.*

Filed February 17, 1914.

350 United States Circuit Court of Appeals, Fourth Circuit, at  
Richmond, Virginia.

No. 1230.

NORFOLK & WESTERN RAILWAY COMPANY, Plaintiff in Error,  
VERSUS

SARAH E. HOLBROOK, Administratrix, Defendant In Error.

Upon Writ of Error from United States District Court for the  
Western District of Virginia, at Roanoke.

*Motion to Dismiss by Defendant in Error.*

Sarah E. Holbrook, Administratrix, etc., comes upon the calling of this case, after notice to counsel for plaintiff in error, and moves this court to dismiss this writ of error, and as grounds in support of said motion, assigns the following, to-wit:

(1.) It appears from the face of the record that this case was tried at the June term, 1913, of the District Court at Roanoke, Virginia; that the single bill of exception was signed by the trial Judge on the "14th day of October, 1913," (rec. 343). This court would have no jurisdiction of this case without a bill of exception signed during the continuance of the June term of the District Court, or within some other time duly extended by order of that court or the rules of that court. There is nothing in this record to show such an order, or rule, and nothing to show that the  
351 "14th day of October, 1913," was not after the expiration of said term. This is jurisdictional and the record should show on its face jurisdictional facts.

2. There is no order of the District Court filing said bill of exception and making it a part of the record, and whether done in term time, or in vacation under a rule or order extending the time, there should have been an order of court noting the presentation, settling, signature and filing of said bill.

3. The bill is a single bill, saving, or attempting to save, three distinct and separate exceptions, to-wit: (a) to refusal of court to direct a verdict, necessarily involving review of all the evidence; (b) to action of court in giving defendant'- in error (plaintiff's)

instruction on the measure of damages, being instruction No. 5; and (c) to the action of the court in giving defendant's in error, (plaintiff's), instruction No. 2. Each of said exceptions and the assignments of error based thereon, make it necessary for this court to examine a distinct and separate line of testimony on distinct and separate matters which are foreign to each other. Therefore, there should have been three separate and distinct bills of exception and not one single bill.

4. Because none of the evidence introduced in the trial court by the parties, (and which is absolutely necessary for this court to review and consider in passing upon each and all of said exceptions and assignments of error,) is incorporated in said bill of exceptions or made a part thereof by proper reference and identification. (See "Affidavit" herewith printed.)

It appearing from said affidavit, (and also from said original bill, which is asked to be ordered filed in this court by the clerk of trial court under Sec. 4 of Rule 14 of this court), that, so far from it affirmatively appearing that the matter introduced into this transcript by the clerk of the trial court as the evidence of the parties in this case, being identified and authenticated by the Judge

of the trial court as that evidence, it affirmatively appears that said Judge did not identify or authenticate said matters as the evidence, either by incorporating it in his bill, or by referring to it by any mark, letter, numbering, signature, or other mark of identification, so that the clerk might know it; and it appears from an inspection, of said so-called evidence that it has not so much as the Style and Title of this case written or marked upon it, and that there is no identification mark from which it could be inferred that said so-called evidence was ever so much as seen by said trial Judge; and that the only authority the clerk had for supposing it to be the evidence in this case was the fact that counsel for plaintiff in error delivered it to him as and for the evidence in this case, and also delivered to him what purported to be a copy of said so-called evidence to be put by him into the transcript of the record in this case, which the clerk did at and by the request of said counsel for the plaintiff in error.

Respectfully submitted,

SARAH E. HOLBROOK,

*Administratrix,*

By COUNSEL.

WM. H. WERTH, *Attorney.*

*"Affidavit."*

VIRGINIA,

*In Tazewell County Clerk's Office, To wit:*

I, C. W. Greever, Clerk of the County of Tazewell, and as such ex-Officio Clerk of the Circuit Court of said County, hereby certify that William H. Werth, an attorney practicing in said court, this day personally appeared before me in my office and county afore-

said, and being duly sworn by me, made oath to and subscribed the following statement, to-wit:

(1). That he is counsel for the defendant in error in the law case of the Norfolk and Western Railway Company plaintiff in error, versus Sarah E. Holbrook, Administratrix, etc., defendant in error, now pending in the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and coming on to be heard in said Court at the present February Term thereof, and known by the docket No. 1230.

353 (2). That he, (Affiant), has very recently (and since filing original brief for defendant in error,) examined the original papers of said law case on file in the clerk's office of the United States District Court for the Western District of Virginia at Roanoke, where said case was tried; that the following facts, (except those stated in paragraph "(d)" hereof) appear from an inspection of said original papers, to-wit:

(a). That the original bill of exception consists of eleven sheets fastened together within an outside cover by paper fasteners; that on the back of this cover is the following pen and ink endorsement in the handwriting of Stanley W. Martin, Clerk of said District Court at Lynchburg, Virginia, to-wit:

"Holbrook's Admx. vs. N. & W. R. R. Co., Defendant's bill of Exceptions. Filed October 14, 1913. Stanley W. Martin, Clerk.

(b). That after "words and figures as follows" the whole of first sheet of said bill is blank except for the word "Copy" in pencil; that after said word there is a narrow slip of paper attached to said first sheet by a pin on the left edge; that upon this slip are the typewritten words found on page 25 of printed record and embraced within a parenthesis beginning "(Here insert" and ending with "page 531)."

That the second sheet of said bill begins with the words, to-wit "Which was all the evidence introduced in this case," being the same words now found at marginal page 548, (top page 328), of printed record; that immediately following the words last quoted from said bill, there follows the same matter now appearing in said printed record from and after said marginal page 548 to and including the signature "Henry C. McDowell (Seal) District Judge," on page 343 of said printed record.

354 (c). That no part of the matter now appearing in said printed record from and after the said words, "(Here insert", etc., and "page 531)", beginning at marginal page 30, to and including the words "End of testimony for both plaintiff and defendant", at marginal page 548, is incorporated into or made a part of said original bill of exceptions otherwise than by the typewritten words on the narrow slip of paper enclosed in parenthesis as stated and that no part of said matter now appearing in said printed record between the pages mentioned is contained in any exhibit or other paper attached, appended, or annexed to said bill of exceptions.

(d). That William V. Martin, Deputy Clerk of U. S. District Court at Roanoke, upon being asked where he got the evidence in

said case to put into the transcript, by affiant, produced a bound volume of type-written matter which said deputy stated had been delivered to him in his office October 14, 1913, by counsel for said Railway Company, along with what appeared to be a similar volume, as and for two copies of the evidence in said case; and that he (said deputy), had put one of said volumes into said transcript as and for the evidence and retained the other in his office.

(c). That said bound volume now on file in said clerk's office has upon the inside of the cover the following endorsement, to-wit: "Filed Oct. 14, 1913. Stanley W. Martin, Clerk, by W. V. Martin, Deputy Clerk." That there is no indorsement upon the same, and no mark, printed, type-written, written, or otherwise giving the title or short style of said law case or intended or tending to show that said volume contains the evidence in any given case, or intended or tending to show that the trial Judge ever saw said bound volume.

(Subscribed by)

WILLIAM H. WERTH.

Given under my hand this February 10, 1914.

C. W. GREEVER, *Clerk*.

355     *Order Directing Clerk of District Court to Transmit to This Court the Original Bill of Exception, &c.*

Filed and Entered February 17, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1230.

NORFOLK & WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

SARAH E. HOLBROOK, Administratrix, Defendant in Error.

Upon the Application of Defendant in Error, by Her Attorney  
William H. Werth.

It is ordered that the Clerk of the District Court of the United States for the Western District of Virginia, at Roanoke, do transmit to this Court forthwith the original bill of exception and the volume of typewritten matter described in the Affidavit of William H. Werth, in the above entitled cause.

Feb. 17, 1914.

J. C. PRITCHARD,

*Senior Circuit Judge Presiding.*

Same day, copy of foregoing order transmitted to the Clerk of the United States District Court at Roanoke, Va.

February 20, 1914, original bill of exception &c., together with certificate of Clerk certified up to this Court in obedience to order entered on February 17, 1914.

*Affidavits on Behalf of Plaintiff in Error in Opposition to Motion of Defendant in Error to Dismiss Writ of Error.*

Filed February 23, 1914.

356 STATE OF VIRGINIA,  
*City of Roanoke, To wit:*

I, Warren Wellford, a Notary Public in and for the City of Roanoke in the State of Virginia, hereby certify that Roy B. Smith, an Attorney at law, this day personally appeared before me in my City and State aforesaid, and being duly sworn by me made oath to and subscribed his name to the following statement, to-wit:

First. That he is one of the Counsel for the Plaintiff in Error in the law case of the Norfolk & Western Railway Company, Plaintiff in Error vs. Sarah E. Holbrook, Administratrix, etc., Defendant in Error now pending in the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and coming on to be heard in said court at the present February term thereof, and known by the docket number 1230;

Second. That affiant was Counsel in and took part in the trial of said case in the United States District Court for the Western District of Virginia at Roanoke, Virginia, where said case was tried and verdict and judgment rendered;

Third. That the proceedings of said trial including the testimony of all the witnesses, was stenographically reported by Morris  
357 & Hart, Stenographers, and that said Morris & Hart made typewritten copies of said proceedings, including all the evidence of the witnesses examined in the case; that said typewritten copies of said proceedings were one original and several carbon copies thereof.

Fourth. That affiant assisted in the preparation of the one bill of exceptions in this case; that when said bill of exceptions was prepared it was contemplated that the portion of the bill of exceptions preceding the evidence, which is found on page 25 of the printed record and on page 8 of the stenographer's typewritten evidence, would be detached from the balance of the bill of exceptions and attached to the typewritten copy of the evidence at the point indicated by the little slip which was pinned on the original bill of exceptions, and that the remaining portion of the bill of exceptions was to be attached after all of the evidence was thus inserted after the words "End of testimony for both Plaintiff and Defendant" found on page 531 of the typewritten evidence, as originally pagged;

Fifth. That affiant went to Lynchburg, Virginia on October 14th, 1913 to present said bill of exceptions and to have it signed by Judge  
358 Henry C. McDowell, the Judge of the District Court of the United States for the Western District of Virginia who had presided at the trial of said case; that Mr. W. H. Werth had notice that the bill of exceptions would be presented in the form in which it was presented, and that he had notified counsel for De-

endant below that he did not care to be present when said bill of exceptions was signed; that on arriving in Lynchburg affiant went to the office of Judge Henry C. McDowell, which was adjoining the office of Stanley W. Martin, Clerk of the United States District Court for the Western District of Virginia, at Lynchburg, Va. and also at Roanoke, Va., his said office at Lynchburg, Va. being in the United States public building; that affiant had taken with him to Lynchburg, Va. two typewritten copies of the proceedings and evidence in the trial of the case, one to be embodied in the bill of exceptions and the other to be delivered to the Clerk for his use in certifying said bill of exceptions, so as to save the cost of having the same re-copied so far as the evidence was concerned; that as a part of the bill of exceptions, one of the bound copies of said evidence was presented to Judge McDowell by affiant in the presence of Stanley W. Martin, the Clerk, as aforesaid, who was present in Judge McDowell's room at the request of affiant, and that before signing said bill of exceptions, Judge McDowell cut from

359 the said typewritten copy of said evidence all the leaves therein from the front part down to page 8 and crossed out with pencil what is written on page 8 of said copy to the words:— "And the Plaintiff to further sustain the issue joined upon her part introduced the following evidence in chief," and also cut from said typewritten copy all of the pages thereof after page 531 of said typewritten copy and crossed out with pencil on page 531 all that is typewritten thereon after the words:—"End of testimony for both Plaintiff and Defendant." He also cut out of said typewritten copy of said evidence the stenographic report of the evidence of George A. Smith and H. C. Weller, and he inserted in the place of the leaves thus cut out the evidence of said two witnesses reduced to narrative form by pinning the same therein. He then renumbered with pencil the pages of the evidence beginning with the evidence thus inserted of George A. Smith. When the evidence was thus fixed ready to be inserted bodily into the bill of exceptions by pasting the front page of the bill of exceptions in front of the evidence and the remaining pages thereof after the evidence, affiant asked to be allowed to do this, and the Judge said that Mr. Martin, the Clerk, would do it. Mr. Martin then being present, and the Judge

explained to Mr. Martin how the evidence was thus to be  
360 inserted in the bill of exceptions bodily, and Mr. Martin said that he understood it and would do it, and it was left to the Clerk to do, the Judge then signing the bill of exceptions and delivering the bill of exceptions with the copy of the evidence that he himself prepared, as hereinbefore set out, as a part thereof, to the Clerk, and affiant believing that the Clerk would immediately paste the evidence bodily into the bill of exceptions as it was contemplated should be done, and as the Judge directed the Clerk to do, did not pay any further attention to this. After said bill of exceptions and orders and other papers connected with the appeal, which the Judge were to sign, had been signed by the Judge, said bill of exceptions and all of said other papers and orders were then and there, in affiant's presence, delivered by the Judge to Stanley W.



Martin, as the Clerk of the United States District Court for the Western District of Virginia, at Roanoke, Va., said Stanley W. Martin being present all the time during affiant's interview with the Judge until said papers were all signed and delivered to him.

Sixth. Affiant further states that subsequently, and before leaving Lynchburg, he was in the office of Stanley W. Martin in said public building at Lynchburg and that said Stanley W.

361 Martin said to him:—"I have wrapped up the bill of exceptions and all the papers in connection with the writ of error in the case of Holbrook vs. N. & W., and if it is not too much trouble, I would like you to take them to the Clerk's Office at Roanoke." Affiant said that he could readily do this, and he accordingly took said papers from said Stanley W. Martin, in his office at Lynchburg, and brought them with him to Roanoke on the same day, and on his arrival in Roanoke he went to his office and left his valise, and immediately took said papers to the Clerk's Office of the U. S. District Court for the Western District of Virginia at Roanoke, and there delivered them to Williams V. Martin, Deputy Clerk, just in the shape in which they were given to him; that in said bundle of papers affiant believes there was the extra copy of the typewritten evidence which had been delivered by affiant to Stanley W. Martin in Lynchburg; that this was the delivery of these typewritten copies of the evidence which Williams V. Martin, Deputy Clerk, must have referred to in making the statement attributed to him, if he did make it, in paragraph D of affidavit of William H. Werth on page 5 of motion to dismiss, as affiant made no other delivery of said papers to said Williams V. Martin.

362 Affiant further states that since he has received a copy of the motion of William H. Werth, Attorney for Sarah E. Holbrook, Administratrix, to dismiss Plaintiff in Error's writ of error, he has examined said original bill of exceptions in the Clerk's Office of the United States District Court for the Western District of Virginia at Roanoke, Virginia, and that the same is precisely as it was when signed by Judge Henry C. McDowell at Lynchburg, and by him delivered to Stanley W. Martin, Clerk, as aforesaid.

Subscribed by

ROY B. SMITH.

Given under my hand this 19th day of February, 1914.

WARREN WELLFORD,

*Notary Public.*

My commission expires January 27, 1917.

STATE OF VIRGINIA,

*City of Roanoke, To wit:*

I, Warren Wellford, a Notary Public in and for the City of Roanoke, State of Virginia, hereby certify that Stanley W. Martin, this day personally appeared before me in my City and State  
363 aforesaid, and being duly sworn by me, made oath to and subscribed his name to the following statement, to-wit:—

First. That he is the Clerk of the United States District Court for the Western District of Virginia at Roanoke, Virginia, and that he has read the foregoing affidavit of Roy B. Smith made this day, and that so far as the same refers to what took place in his presence, and what was done by him as related in said affidavit, that the same is true and correct.

Subscribed by

STANLEY W. MARTIN.

Given under my hand this 19 day of February, 1914.

WARREN WELLFORD,

*Notary Public.*

My commission expires January 27, 1917.

STATE OF VIRGINIA,

*City of Roanoke, To wit:*

I, Warren Wellford, a Notary Public in and for the City of Roanoke, State of Virginia, hereby certify that Williams V. Martin, this day personally appeared before me in my City and State  
364 aforesaid, and being duly sworn, by me, made oath to and subscribed his name to the following statement, to-wit:—

First. That he is the Deputy of Stanley W. Martin, Clerk of the District Court of the United States for the Western District of Virginia at Roanoke, Va., and that he has read over the foregoing affidavit made this day by Roy B. Smith, and that so far as the same relates to the delivery by Roy B. Smith of the papers referred to in said affidavit to affiant in the Clerk's Office of the United States District Court for the Western District of Virginia, at Roanoke, that the same is true and correct and that there was no other delivery of said papers made to him by any counsel of the Norfolk & Western Railway Co. or any one else.

Subscribed to by

WILLIAMS V. MARTIN,

*Deputy Clerk.*

Given under my hand this 19 day of February, 1914.

WARREN WELLFORD,

*Notary Public.*

My commission expires January 27, 1917.

365 *Motion of Plaintiff in Error for Certiorari for Diminution of the Record.*

Filed February 23, 1914.

N. & W. RAILWAY COMPANY, Plaintiff in Error,  
vs.

SARAH E. HOLBROOK, Administratrix, Defendant in Error.

Upon Writ of Error from United States District Court for the Western District of Virginia, at Roanoke, Va.

The Norfolk & Western Railway Company, Plaintiff in Error moves the court for a writ of certiorari for diminution of the record to have duly certified to this court the opening and adjournment orders of the District Court of the United States for the Western District of Virginia at Roanoke from the opening of the June term, 1913, of said court up to and including October 14, 1913, and alleges that said orders will show that the June term, 1913 of said court was still in session at the time of the signing sealing and filing of the bill of exceptions of the Plaintiff in Error on October 14, 1913.

Respectfully submitted,

NORFOLK & WESTERN RAILWAY  
COMPANY,  
By COUNSEL.

— — —  
— — —

*Attorneys.*

STATE OF VIRGINIA,  
*City of Roanoke, To wit:*

I, R. C. Royer, a Notary Public in and for the City of Roanoke in the State of Virginia, do hereby certify that Williams V. Martin, who is the Deputy Clerk of the District Court of the United States for the Western District of Virginia at Roanoke this day personally appeared before me and made oath that the opening and adjournment orders of the District Court of the United States for the Western District of Virginia, at Roanoke, Va., will show that the June term, 1913 of said court was still in session at the time of the signing, sealing and filing of the bill of exceptions of the Plaintiff in Error on October 14, 1913, and signed his name hereto.

WILLIAMS V. MARTIN.

Given under my hand this 21st day of February, 1914.

[SEAL.]

R. C. ROYER,  
*Notary Public.*

My commission expires July 1st, 1917.

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*Certificate of Clerk of the District Court.*

Filed February 23, 1914.

In the Clerk's Office, United States District Court for the Western District of Virginia, at Roanoke, Virginia, Feb. 21, 1914.

Order Opening Court June 16, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Begun and Held at Roanoke, within and for said District, on the 16th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order June 16, 1913.

Ordered that this court be adjourned until the 17th day of June, 1913.

Order Opening Court June 17, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 17th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order June 17, 1913.

Ordered that this court be adjourned until the 18th day of June, 1913.

Order Opening Court June 18, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 18th Day of June, 1913.

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Hon. Henry C. McDowell, Judge.

Adjourning Order June 18, 1913.

Ordered that this court be adjourned until the 19th day of June, 1913.

Order Opening Court June 19, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 19th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order June 19, 1913.

Ordered that this court be adjourned until the 20th day of June 1913.

Order Opening Court June 20, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 20th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order June 20, 1913.

Ordered that this court be adjourned until the 21st day of June, 1913.

Order Opening Court June 21, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 21st Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order June 21, 1913.

Ordered that this court be adjourned until the 23rd day of June, 1913.

Order Opening Court June 23, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at  
369 Roanoke, within and for said District, on the 23rd Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of June 23, 1913.

Ordered that this court be adjourned until the 24th day of June, 1913.

Order Opening Court June 24, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 24th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of June 24, 1913.

Ordered that this court be adjourned until the 25th day of June, 1913.

Order Opening Court June 25, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 25th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of June 25, 1913.

Ordered that this court be adjourned until the 26th day of June, 1913.

Order Opening Court June 26, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 26th Day of June, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of June 26, 1913.

Ordered that this court be adjourned until the 27th day of June, 1913.

Order Opening Court June 27, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 27th Day of June,  
370 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of June 27, 1913.

Ordered that this court be adjourned until the 9th day of July, 1913.

Order Opening Court July 9, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 9th Day of July, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of July 9, 1913.

Ordered that this court be adjourned until the 15th day of July, 1913.

Order Opening Court July 15, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 15th Day of July, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of July 15, 1913.

Ordered that this court be adjourned until the 8th day of August, 1913.

Order Opening Court August 8, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 8th Day of August, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of August 8, 1913.

Ordered that this court be adjourned until the 28th day of August, 1913.

Order Opening Court August 28, 1913.

371 At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 28th Day of August, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of August 28, 1913.

Ordered that this court be adjourned until the 29th day of August, 1913.



Order Opening Court August 29, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 29th Day of August, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of August 29, 1913.

Ordered that this court be adjourned until the 30th day of August 1913.

Order Opening Court August 30, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 30th Day of August, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of August 30, 1913.

Ordered that this court be adjourned until the 4th day of September, 1913.

Order Opening Court September 4, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 4th Day of September, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of September 4, 1913.

Ordered that this court be adjourned until the 25th day of September, 1913.

Order Opening Court September 25, 1913.

372 At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 25th Day of September, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of September 25, 1913.

Ordered that this court be adjourned until the 13th day of October, 1913.

Order Opening Court October 13, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 13th Day of October, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of October 13, 1913.

Ordered that this court be adjourned until the 14th day of October, 1913.

Order Opening Court October 14, 1913.

At a Regular Term of the District Court of the United States for the Western District of Virginia, Continued and Held at Roanoke, within and for said District, on the 14th Day of October, 1913.

Hon. Henry C. McDowell, Judge.

Adjourning Order of October 14, 1913.

Ordered that this court be adjourned until the 21st day of October, 1913.

I, Stanley W. Martin, Clerk of the District Court of the United States for the Western District of Virginia, at Roanoke, Virginia, do hereby certify that the foregoing are true and correct copies of the opening and adjournment orders entered in the common law order book of said court from the beginning of the June Term, 1913 of said court, on the 16th day of June, 1913, to and including the 14th day of October, 1913.

[SEAL.]

STANLEY W. MARTIN, *Clerk*.

373 February 23, 1914, (February Term, 1914), cause came on to be heard on motion of defendant in error to dismiss writ of error, and on merits, before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

May 5, 1914, (May Term, 1914), the Court announced and filed its opinion, which is as follows, to-wit:

*Opinion.*

Filed May 5, 1914.

374 United States Circuit Court of Appeals, Fourth Circuit.

No. 1230.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,  
versusSARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Defendant in Error.In Error to the District Court of the United States for the Western  
District of Virginia, at Roanoke.

[Argued February 23, 1914; Decided May 5, 1914.]

Before Pritchard, Knapp and Woods, Circuit Judges.

Roy B. Smith, Marshall McCormick, and F. Markoe Rivinus McCormick & Smith, and Theodore W. Reath on briefs) for plaintiff in error, and William H. Werth for defendant in error.

WOODS, *Circuit Judge*:

W. T. Holbrook, a bridge carpenter, was killed in January, 1913, on one of defendant's railroad bridges by a passenger train, known as number 15. The plaintiff, his widow, as administratrix of his estate suing for the benefit of herself and his five infant children under the act of Congress of 1908 as amended in 1910, recovered judgment for damages in the District Court for the Western District of Virginia, under the allegation that her intestate's death was caused by the negligence of the defendant.

The motion to dismiss the appeal must be refused. The first ground for the motion presented at the argument that every matter charged as error should be brought up by a separate bill of exceptions is disposed of by this language of Mr. Justice Brewer in *Lees vs. United States*, 150 U. S., 482: "It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be incorporated into one bill of exceptions." The principle cannot be too strongly emphasized that the sole purpose of bills of exceptions and assignments of error is to bring separately and clearly the matters complained of before the trial judge so that he may have the opportunity to grant relief if he thinks proper, before counsel for defendant in error so that he may be advised of the precise points to be met in argument, and before the appellate court so that it may readily perceive the points to be decided and the portions of the record on which they depend. Repetition not necessary to these ends should not encumber the record.

The second ground for the motion is that the evidence is not

incorporated in the exceptions so as to be sufficiently identified. The only assignment of error requiring any particular reference to the evidence is that alleging that on the whole evidence the District Judge should have directed a verdict for the defendant. The record shows clearly that it was the intention of counsel and the District Judge to incorporate the entire testimony in the bill of exceptions. To that end at the proper place a slip of paper was pinned, on which was typewritten: "(Here insert all the evidence, beginning with the words 'And the plaintiff,' on page 8, and concluding with the end of the testimony for both plaintiff and defendant on page 531.)" By inadvertence the typewritten copy of the evidence having this paging indicated was not actually inserted, but was separately filed. No attack is made on the correctness of the copy and it appears in

the printed record as the evidence covered by the certificate of 376 the District Judge; but it is said nevertheless not to be identified. It would be applying technicality beyond all reason to hold that testimony identified by the paging, unquestioned as a matter of fact, and relating on its face to the cause, was not the testimony which the District Judge meant to certify. The facts leave the case entirely outside of the principle laid down in 2 Foster on Fed. Prac. (5th Ed.), 1594, and a number of cases, that documents or other evidence referred to in the bill will be excluded from consideration if not properly identified.

2. On the merits it is contended that the District Judge should have directed a verdict for the defendant on the ground that the evidence was insufficient to warrant the inference of negligence on the part of the defendant as a proximate cause of the death of Holbrook.

When Holbrook was killed he in company with five other men under the directions of the foreman Carbaugh was putting down guard rails on the westbound track of a double-tracked bridge 228 feet long. Within fifty feet of the west approach of the bridge there is a curved tunnel, and near the east approach there is another curve in a cut. Trains passed frequently, and those coming from the west through the tunnel drew the smoke over the bridge. These conditions made the place of work one of great danger, requiring on the part of the defendant corresponding care in the protection of its men. Recognizing this duty in such conditions the railroad company required of its foremen the observance of these rules:

"Foremen or others in charge of employees working on or about the tracks must instruct their men to be alert, watchful, and to keep out of danger; and will take all reasonable precautions to see that all men working under their immediate supervision receive warnings of approaching trains in time to reach a place of safety.

"When working on tracks in places where approaching trains cannot readily be seen because of permanent obstructions to the view, or temporary obstructions, such, for instance, as fog, storms, snow or engines or cars, extra precautions must be taken to warn the men of approaching trains.

"As an extra precaution, when necessary to place a watchman at

377 some distance from the men at work on the tracks, or in such location that his signals may not be understood, additional watchmen should be placed so that the signals can be passed to the men at work and return signals obtained. In case return signals are not received and understood, the watchman must signal the train to stop."

Carbaugh, the foreman, took no other precautions than to stand on the eastbound track and call "railroad" or "clear up" on observing the approach of a train. In this situation westbound passenger train 15 passed, with signals that another section was to follow. Several hours afterwards eastbound freight train 92, carrying about forty cars, came through the tunnel pulling smoke over the bridge. Before all the cars had cleared the bridge, the second section of westbound passenger train 15 approached from the curve on the east side on the track where Holbrook was working, and killed him. Carbaugh's range of vision on the track towards this train was not more than three or four hundred feet, which would be run by a train going thirty miles an hour in not exceeding ten seconds. When the foreman made the call for train 92, Holbrook and the witness Walters were engaged in framing a new guard rail on the westbound track, and between that call and the approach of train 15, it was necessary for Holbrook and Walters to take the timbers off the track and get to a place of safety on the girders or floor beams beyond the track. No witness saw Holbrook when he was struck, and there is some conflict in the evidence as to his situation when train 15 was about to reach his position, but the conflict is not material. Taken together the evidence leaves no doubt that Holbrook was struck either while he was in the act of removing a piece of timber from the track or immediately after removing it and before he reached a place of safety.

This short statement of the admitted conditions and the precautions taken by Carbaugh is enough to show clearly that there was good ground for the jury to infer that the precautions were not such as due care required, and that in anticipation of the danger to which the workmen would be subjected from the contingency of two trains approaching the bridge at the same time from opposite directions, Carbaugh should have protected them by flags. The motion to direct a verdict was therefore properly refused.

378 3. The defendant charges error in an instruction that the verdict should be for the plaintiff if the jury found that Holbrook's death was due to the negligence of any of defendant's servants other than Carbaugh, when there was no evidence of negligence of any other employee. The expression, "other agents or employees" used in the charge clearly meant agents or employees other than Holbrook himself, and therefore was proper since it excluded Holbrook and included Carbaugh.

4. After charging the jury that the recovery, if any, was to be measured by the pecuniary loss suffered by the widow and children as the direct result of the death of the husband and father, and that damages for sorrow and loss of love or other purely sentimental

injury could not be allowed, the District Judge gave the following instruction which is assigned as error:

"However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages."

In construing the statute of 1885 applicable to the District of Columbia, the Supreme Court of the United States said as to the measure of damages:

"Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to maintain themselves and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance." *Baltimore & P. R. Co. v. Mackey*, 157 U. S., 72.

379 In the course of full discussion of the subject in *Michigan, etc., R. Co. v. Vreeland*, 227 U. S., 59, the court after emphasizing the rule that the recovery must be limited to pecuniary loss from the death continues: "The rule for the measurement of damages must differ according to the relation between the parties plaintiff and decedent, according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled. *Tiffany*, *Death by Wrongful Act*, sections 158, 160, 161, 162." Difference in the value of prospective support, and intellectual, moral and physical training to be expected from a father or mother, and from any other benefactor inheres in the nature of social relations. While no compensation can be given for the loss of love, yet in estimating the pecuniary value of expected maintenance and training the fact cannot be ignored that it will be increased in proportion to the intelligent solicitude which prompts the service, and that therefore maintenance of a wife by her husband and maintenance and training of children by their father will, as a rule, be of greater value than like service from other kindred. This difference is clearly implied in the case last cited. In recognition of the principle it has been held that in estimating damages for the death of a husband the legal obligation to support is not the sole factor, and that alienation of affection, separation, strained relations and contemplated divorce proceedings might be proved and should be considered by the jury in favor of the defendant. *Fogarty v. New York & N. H. R. Co.*, 133 Pac. (Wash.), 609; *Farley v. New York & N. H. R. Co.*, 87 Atl. (Conn.), 990.

But not only this reasonable expectation of greater voluntary service, but the legal obligation of a husband and father to support his wife and children makes his life of greater pecuniary value to them than the life of any other upon whom they might be dependent. In view of the general principle applied to the undisputed evidence in this case that the deceased was a capable and industrious workman, devoted to his family and assiduous in the discharge of his domestic obligations, it cannot be said that there was error of law in the instruction that the pecuniary injury to a wife and infant children from the death of the husband and father would be much greater than from the death of any other relative upon whom they might be dependent.

Affirmed.

381 May 9, 1914, (Same term), the Court made and entered the following judgment, to-wit:

*Judgment.*

Filed and Entered May 9, 1914.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1230.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Defendant in Error.

In Error to the District Court of the United States for the Western  
District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed, with costs.

May 9, 1914.

C. A. WOODS,  
*Circuit Judge.*



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*Petition for Writ of Error.*

Filed May 25, 1914.

United States Circuit Court of Appeals for the Fourth Circuit.

No. 1230.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,  
v.  
SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Deceased,  
Defendant in Error.

Your petitioner, Norfolk and Western Railway Company, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit, and a judgment has therein been rendered on the ninth day of May, A. D. 1914, affirming a judgment of the District Court of the United States for the Western District of Virginia, and the matter in controversy in said suit exceeds One Thousand Dollars (\$1,000.00), besides costs, and that the jurisdiction of none of the courts above mentioned is, or was, dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, or the revenue laws, or the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and, therefore, your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Fourth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

NORFOLK AND WESTERN RAIL-  
WAY COMPANY,

*Plaintiff in Error,*  
By WM. G. MACDOWELL,  
*Vice-President.*

F. MARKOE RIVINUS,  
THEODORE W. REATH,  
*Attorneys for Norfolk and Western  
Railway Company, Plaintiff in Error.*

Attest:

I. W. BOOTH,  
[SEAL.] *Ass't Secretary.*

383 UNITED STATES OF AMERICA,  
*State of Pennsylvania,*  
*City and County of Philadelphia, ss:*

William G. Macdowell, being duly sworn according to law, deposes and says that he is the Vice President of the Norfolk and Western Railway Company, Plaintiff in Error in the above entitled cause: that the statements contained in the foregoing petition are true, and that the writ of error therein prayed for is not taken for the purpose of delay but because the said Plaintiff in Error, feels that an injustice has been done by reason of said judgment.

WM. G. MACDOWELL.

Sworn to and subscribed before me this 22nd day of May, 1914.

[SEAL.]

WILLIAM E. STOKES,

*Notary Public.*

Commission expires April 9, 1917.

*Order Allowing Writ of Error.*

Filed and Entered May 25, 1914.

The foregoing petition is granted and writ of error allowed as prayed for, upon plaintiff in error's giving a supersedeas bond, according to law, in the sum of thirty-five thousand Dollars.

May 25, 1914.

MARTIN A. KNAPP,

*Circuit Judge, Fourth Circuit.*

*Assignment of Errors.*

Filed May 25, 1914.

United States Circuit Court of Appeals for the Fourth Circuit.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff in Error,

v.

SARAH E. HOLBROOK, Administratrix of W. T. Holbrook, Defendant  
in Error.

Now comes the Plaintiff in Error, Norfolk and Western Railway Company, by F. Markoe Rivinus and Theodore W. Reath its  
384 attorneys, and says that in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Western District of Virginia for Twenty-five Thousand Dol-

lars (\$25,000.00) and interest at the rate of six per cent (6%) per annum from and after the 27th day of July, 1913, and costs of suit entered on error in favor of said defendant in error and against said plaintiff in error:

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court aforesaid and in not remanding said case to said District Court for a new trial:

Third. Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause which is as follows:

The Court erred in giving the following instruction on behalf of the plaintiff to the jury, known as "Plaintiff's Instruction No. 5", as shown by bill of exceptions, which instruction is as follows:

"Plaintiff's Instruction No. 5.

The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

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However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding \$40,000.00, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed; and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

(2) The jury will also take into consideration the care, attention, instruction, training, advice and guidance which one of dece-

dent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

Defendant at the time objected to this instruction because it takes in elements which do not properly enter into consideration by the jury of damages, if any, plaintiff is entitled to recover; because the court tells the jury that the widow and infant children  
386 of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related:

Fourth. Said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause, which is as follows:

Second. The Court erred in giving on behalf of the plaintiff the following instruction, known as "Plaintiff's Instruction No. 2" as shown by Bill of Exceptions, which instruction is as follows:

"Plaintiff's Instruction No. 2.

The court further instructs the jury that if they believe from the evidence in this case that the death of said Holbrook, at the time and place alleged, resulted proximately in whole or in part from the negligence of any of defendant's other agents or employes, as set out and alleged in any count of plaintiff's declaration, then the court instructs you that defendant is liable in damages for the death of said Holbrook to the plaintiff, for the benefit of said Holbrook's surviving widow and infant children."

Defendant at the time objected to this instruction on the ground that it is uncertain, vague and indefinite; because there is no evidence in the case upon which to predicate it; and because there is no evidence in the case tending to prove negligence of any other agent or employe of defendant Company than Carbaugh as the proximate cause of plaintiff's injury:

Fifth. Said Circuit Court of Appeals erred in not sustaining the third assignment of error upon the record in said cause, which is as follows:

Third. The Court erred in not sustaining the motion made by counsel for defendant, as shown by Bill of Exceptions, that the Court direct the jury to return a verdict in its favor made upon the conclusion of the introduction of all of the testimony introduced upon the trial of the case.

Wherefore the said Norfolk and Western Railway Company, plaintiff in-error, prays that for the errors aforesaid, and other  
387 errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled and for naught es-

teemed, and that said case be remanded to the United States District Court for the Western District of Virginia with instructions to grant a new trial in said case, or for such further proceedings in said cause as may be determined upon by this honorable Court to the end that justice may be done in the premises.

NORFOLK AND WESTERN RAIL-  
WAY COMPANY,

By F. MARKOE RIVINUS,  
THEODORE W. REATH,

*Its Attorneys.*

*Supersedeas Bond.*

Filed May 25, 1914.

Know all men by these presents: That we, the Norfolk and Western Railway Company, a corporation incorporated under the laws of the State of Virginia, as Principal, and the United States Fidelity and Guaranty Company of Baltimore, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as Surety, are held and firmly bound unto Sarah E. Holbrook, Administratrix of W. T. Holbrook, in the full and just sum of Thirty-five Thousand (\$35,000) Dollars, to be paid to the said Sarah E. Holbrook, Administratrix of W. T. Holbrook, her certain attorneys, successors or assigns, to which payment, well and truly to be made, the said Principal and the said Surety bind themselves, their and each of their successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 20th day of May, 1914.

Whereas, lately in the Circuit Court of Appeals for the Fourth Circuit in a suit depending in said Court between the Norfolk and

Western Railway Company, Plaintiff in Error, and Sarah E.  
388 Holbrook, Administratrix of W. T. Holbrook, Defendant in

Error, a judgment was rendered against the said Norfolk and Western Railway Company, and the said Norfolk and Western Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Sarah E. Holbrook, Administratrix of W. T. Holbrook, citing and admonishing her to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the — day of —, 1914.

Now, therefore, the condition of this obligation is such That if the said Norfolk and Western Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail

to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

NORFOLK AND WESTERN RAIL-  
WAY COMPANY,  
By WM. G. MACDOWELL,  
*Vice-President.*

Attest:

E. H. ALDEN,  
[SEAL.] *Secretary.*

UNITED STATES FIDELITY AND  
GUARANTY COMPANY,  
By HENRY STROUSE,  
*Resident Vice-Pres't.*

Attest:

EDWARD J. FISHER,  
[SEAL.] *Resident Secretary pro tem.*

Approved May 25, 1914.

MARTIN A. KNAPP,  
*U. S. Circuit Judge.*

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*Writ of Error.*

Issued May 25, 1914.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of  
the United States Circuit Court of Appeals for the Fourth Circuit,  
Greeting:

Because in the record and proceedings, as also in the rendition of  
judgment of a plea which is in the said Circuit Court of Appeals  
before you, or some of you, between the Norfolk and Western Rail-  
way Company, Plaintiff in Error, and Sarah E. Holbrook, Adminis-  
tratrix of W. T. Holbrook, Defendant in Error, a manifest error has  
happened to the great damage of the said Plaintiff in Error as by its  
complaint appears; we being willing that the error, if any hath been,  
should be duly corrected and full and speedy justice done to the  
parties aforesaid in this behalf, do command you, if judgment be  
therein given, that then under your seal, distinctly and openly, you  
send the record and proceedings aforesaid, with all things concerning  
the same, to the Supreme Court of the United States together with  
this writ so that you have the same in the Supreme Court at Wash-  
ington within thirty days from the date hereof, that the record and  
proceedings aforesaid being inspected, the said Supreme Court  
may cause further to be done therein to correct that error, what of  
right, according to the laws and customs of the United States, should  
be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 25th day of May, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

HENRY T. MELONEY,  
*Clerk of United States Circuit Court of  
Appeals for the Fourth Circuit.*

Allowed by—

MARTIN A. KNAPP,  
*Circuit Judge.*

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*Service of Writ of Error.*

Certified copy of this writ of error is lodged in the Clerk's office Circuit, at Richmond, this 3<sup>rd</sup> day of June A. D. 1914.

HENRY T. MELONEY,  
*Clerk U. S. Circuit Court of Appeals,  
Fourth Circuit.*

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*Citation.*

Issued May 25, 1914.

THE UNITED STATES OF AMERICA:

The President of the United States to Sarah E. Holbrook, Administratrix of W. T. Holbrook, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the City of Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of Appeals of the United States for the Fourth Circuit, and wherein the Norfolk and Western Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Norfolk and Western Railway Company, Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 25th day of May, in the year of our Lord 1914.

MARTIN A. KNAPP,  
*Circuit Judge.*

Legal Service Accepted:

WM. H. WERTH,  
*Attorney for Defendant in Error.*

June 1st, 1914.



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*Clerk's Certificate.*

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 3d day of June A. D., 1914.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,  
*Clerk U. S. Circuit Court of  
Appeals, Fourth Circuit.*

Endorsed on cover: File No. 24,258. U. S. Circuit Court Appeals, 4th Circuit. Term No. 516. Norfolk & Western Railway Company, plaintiff in error, vs. Sarah E. Holbrook, administratrix of W. T. Holbrook, deceased. Filed June 5th, 1914. File No. 24,258.

**No. 516.**

Office Supreme Court, U. S.  
**FILED**  
NOV 9 1914  
**OCTOBER TERM, 1914**  
CLERK

**IN THE**  
**Supreme Court of the United States.**

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**NORFOLK AND WESTERN RAILWAY COMPANY,**  
**Plaintiff in Error,**

**vs.**

**SARAH E. HOLBROOK, Administratrix of W. T. Holbrook,**  
**Deceased, Defendant in Error.**

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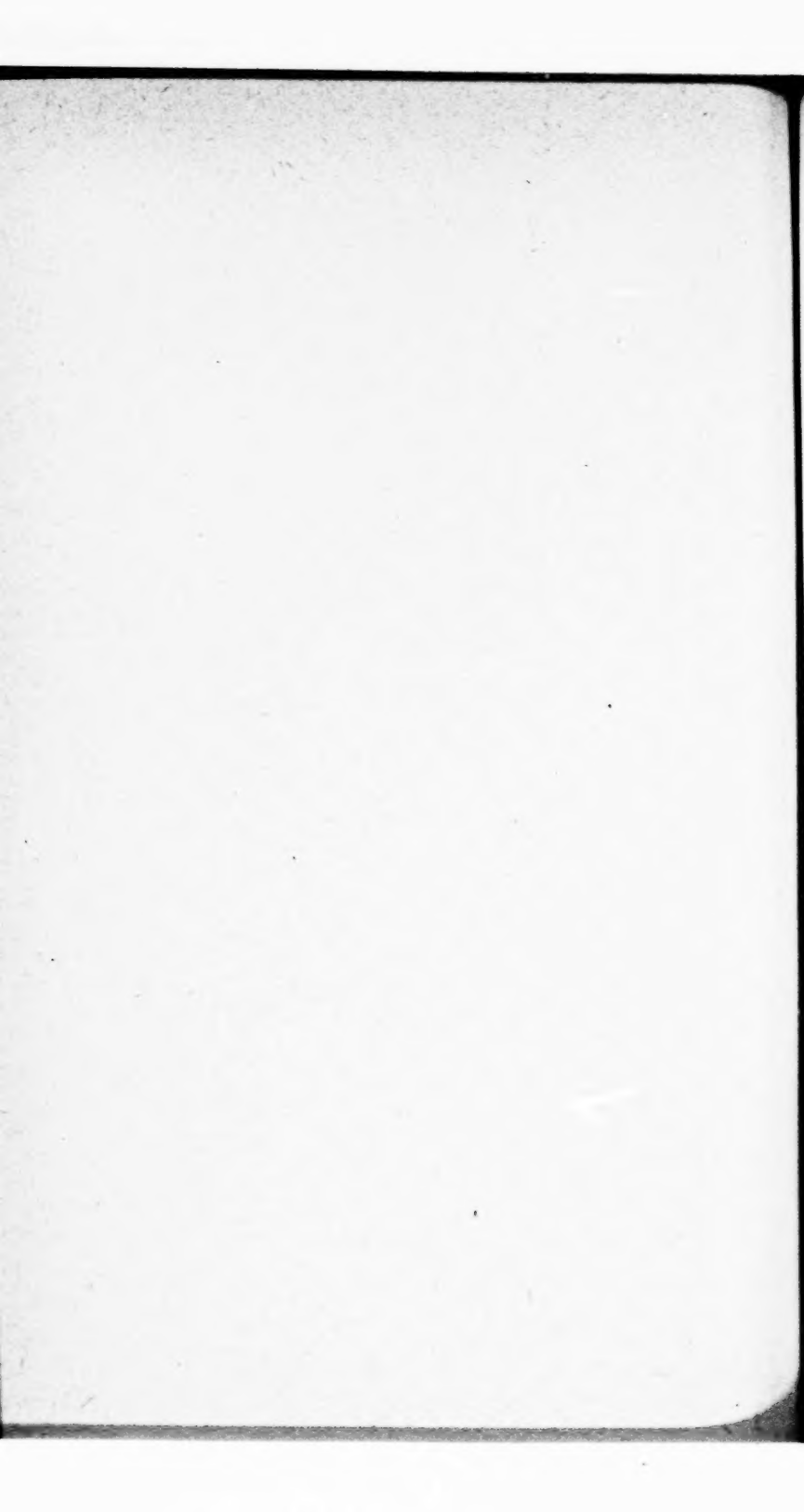
**BRIEF ON BEHALF OF NORFOLK AND WESTERN**  
**RAILWAY COMPANY.**

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**MCCORMICK & SMITH,**  
**F. MARKOE RIVINUS,**  
**THEODORE W. REATH,**

*Attorneys for Norfolk and Western  
Railway Company.*

**NOVEMBER, 1914.**



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# Supreme Court of the United States.

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OCTOBER TERM, 1914. No. 516.

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*Norfolk & Western Railway Company, Plaintiff  
in Error,*

vs.

*Sarah E. Holbrook, Administratrix of W. T. Holbrook, Deceased, Defendant in Error.*

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## BRIEF ON BEHALF OF NORFOLK AND WESTERN RAILWAY COMPANY.

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### I

#### STATEMENT OF CASE.

W. T. Holbrook was employed in interstate commerce by the Railway Company as a bridge carpenter, with other employes, laying a guard rail on a double-track bridge in McDowell County,

West Virginia, and was struck and killed by a train. An action was brought in the United States District Court for the Western District of Virginia for his death for the benefit of his widow and five children from fourteen years to one year of age. The verdict in the District Court was against the Railway Company for \$25,000, on which judgment was entered. This judgment the United States Circuit Court of Appeals for the Fourth Circuit on May 9, 1914, affirmed (Record, page 323). To this judgment a writ of error was awarded from this court (Record, page 325), and the case is here upon three assignments, all presenting the same error, namely, the giving of instruction known as "Plaintiff's Instruction No. 5."

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## II

### ASSIGNMENTS OF ERROR.

*First.*—Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Western District of Virginia for Twenty-five Thousand Dollars (\$25,000.00) and interest at the rate of six per cent. (6%) per annum from and after the the 27th day of July, 1913, and costs of suit entered on error in favor of said defendant in error and against said plaintiff in error.



*Second.*—Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court aforesaid and in not remanding said case to said District Court for a new trial.

*Third.*—Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause which is as follows:—

The Court erred in giving the following instruction on behalf of the plaintiff to the jury, known as “Plaintiff’s Instruction No 5,” as shown by bill of exceptions, which instruction is as follows:

“PLAINTIFF’S INSTRUCTION No. 5.

The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding \$40,000.00, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed; and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character,

and expectancy of life, as shown by the evidence introduced before you.

(2) The jury will also take into consideration the care, attention, instruction, training, advice and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

Defendant at the time objected to this instruction because it takes in elements which do not properly enter into consideration by the jury of damages, if any, plaintiff is entitled to recover; because the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related.

The fourth and fifth assignments of error (Record, page 327) will not be pressed and need not be considered by this court.

### III

#### ARGUMENT.

1. The District Court erred in giving to the jury Plaintiff's Instruction No. 5, whereby the Court directed the jury that a widow and infant children would suffer a "pecuniary injury \* \* \* much greater" than hypothetical adults or next of kin.

The part of the instruction particularly complained of is as follows:—

"However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased, and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages."

This instruction was an attempt to interpret the Federal Employers' Liability Act in respect of an important feature; the pecuniary damages which the statutory beneficiaries might recover. In other parts of the instruction the Court gave

directions to the jury, (based on *American Railroad of Porto Rico vs. Didricksen*, 227 U. S., 145, and *Gulf, C. & S. F. Ry. Co. vs. McGinnis*, 228 U. S., 173), that the pecuniary value of the life to the beneficiaries should guide them; but in the part quoted the instruction directed the jury to make a comparison between decedent's minor children and hypothetical adult beneficiaries or mere next of kin; and directed the jury that the damage in the case before them would be much "greater than" in the undefined, hypothetical cases. The jury must have been strongly influenced by the direct statement in Instruction No. 5 (a) that the recovery in the case at bar should be much greater than if the dependents were adult, and (b) that the relationship itself was, in some way outside of the evidence of the value of the life, to be considered "a factor in fixing the amount of the merely pecuniary damages."

Our opponent argues that the opinion of Mr. Justice Harlan in *B. & P. R. R. Co. vs. Mackey*, 157 U. S., 72, justifies Instruction No. 5. Also *Michigan Central R. R. Co. vs. Vreeland*, 227 U. S., 59, was urged as authority for the instruction. In parallel columns we here quote the instruction and the extracts from the Mackey case and the Vreeland case relied upon by our opponents to support the instruction.

Plaintiff's Instruction  
No. 5. Case at bar.

"Where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages."

Mr. Justice Harlan in  
the Mackey case.

"The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to maintain themselves and who have never depended, and had no right to depend upon the labor or exertions of the deceased for their maintenance."

Mr. Justice Lurton in  
the Vreeland case.

"The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.'"

In the Mackey and Vreeland cases this court was announcing the general proposition of law that the rule for damages must differ as the degree of the *proven* dependence of the beneficiary differs. But matter suitable in an opinion of an Appellate Court may be inappropriate in a charge to a jury. Appellate Courts have occasion to compare different states of fact in order to deduce general propositions of law; but the single function of juries is to find facts from evidence. This

distinction of function is illustrated by comparing the charge to the jury in the Mackey case (157 U. S. 72, at page 92) with the above quotation from Mr. Justice Harlan's opinion approving the charge. The trial judge instructed:

"Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family—who they are and what they consist of—and then, gentlemen, from all the facts and all the circumstances, make up your mind how much this family, if anything, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving; how much had they a reasonable expectation of receiving while he lived, if he had not been killed."

In the case at bar the court directed the jury to give a *much larger* verdict than to hypothetical adults or next of kin. If the case under trial had been that of a crippled adult next of kin who had been by the decedent's death deprived of support as shown by the evidence, it would have been error to instruct the jury that such a beneficiary was entitled to *much smaller* damages than a widow or a minor child.



In *United States vs. Breitling*, 20 Howard, 252, (1858), Mr. Chief Justice Taney said:—

“It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.”

In *The Merchants' Mutual Ins. Co. vs. Baring*, 20 Wallace 159, (1874), Mr. Justice Clifford said “that the court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle or rule of law.”

And in *Haines vs. McLaughlin*, 135 U. S., 584 (1890), Mr. Chief Justice Fuller said that “instructions should never be given upon hypothetical statements of fact, of which there is no evidence.”

Nor can the instruction if erroneous in part be justified on the ground that other parts were correct. In the *Vreeland* case Mr. Justice Lurton

pointed out that an instruction which directed the jury "to confine themselves to a proper compensation for the loss of any pecuniary benefit," though correct, did not cure the error in another part of the instruction in directing the jury that "in addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

The jury could not have made the purely hypothetical comparison which the Court directed them to make. Unless by traveling outside the record and consulting their "experience as men" (a method of computing damages disapproved in the Vreeland case,) the jury could not have any knowledge upon which to make the comparison.

Again, the instruction was erroneous as over-emphasizing the relationship itself of widow and children to the decedent in some way outside the

evidence as if the relationship were "a factor in fixing the amount of the merely pecuniary damages."

In Vreeland's case, this Court explained the limit of recovery by a child to be for "the loss of \* \* \* nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation." In the case at bar the court told the jury "that the relation existing between" the father and his "infant beneficiaries" was "a factor in fixing the amount of the merely pecuniary damages." In Vreeland's case, this Court held that a child may not recover for loss of society, companionship and acts of kindness of a parent because they "originate in the relation and are not in the nature of services, are not capable of being measured by any material standard."

The effect of the error is apparent. Influenced as we believe to consider these sentimental and speculative matters, the jury found a verdict for \$25,000.00. The trial Judge used \$700.00 as the annual figure which deceased "could have expended on his family, or have invested for their ultimate benefit." (Record, page 297.) Upon this figure he then estimated the present

value of future contributions of Holbrook to his family at \$13,388.00. For the element of "instruction and physical, intellectual and moral training which Holbrook, had he lived, would have supplied" (Record, page 298) to his children, the trial Judge found that the difference between the verdict of \$25,000.00 and \$13,388.00, or \$11,612.00 was not excessive. He said: "The jury may properly be assumed to have reasoned that the cost of tutelage would have amounted to about \$60 per month for twenty years" (Record, page 299)—and this for the children of a man occupied in supporting his family and earning from \$65.00 to \$70.00 a month. Holbrook was working away from home on the line of the railroad and "made it the practice to come home about every two weeks, on Saturday night, and would stay until Sunday afternoon." (Record, page 189.) The allowance would seem not to have been for tutelage, but an attempt to do the impossible—convert affection into money. We are not asking this court to review the judgment for a "mere excess upon the evidence," where "the judge charged the jury correctly" (*So. Ry. vs. Bennett*, 233 U. S., 80), but we have presented the lower court's analysis of the verdict as showing the effect of an erroneous charge.

In *New York, C. & St. L. R. R. Co. vs. Niebel*, (C. C. A., Sixth Circuit, June 12th, 1914) 214

Fed. 952. two parts of the charge of the District Court to the jury were complained of as erroneous. We here quote these two parts:

“Now, I said to you before lunch that this law, as the courts are administering it, although the statute is not explicit in that behalf, attempts to be liberal, not niggardly, with the real victims of this accident, the next of kin of this decedent.” (Rec., 241, 232, 225).

And again:

“I say to you that it is your privilege, if you find that damages should be awarded here at all, to look to the home relations of this little family, the association of this husband and wife, their bearing toward each other, and, as you consider that to be, attempt, as best you can, to value in dollars and cents the loss that the wife has sustained by being deprived of this companionship and association of her husband. \* \* \* But to attempt to measure in this coldblooded way that we who have some home ties that we love know is a real, material loss to a woman who loses the association of a husband who was a helpmeet to her. There is a difference between simply awarding a lump sum to assuage her mourning and attempting to give her something for the real loss of the support and companionship of her helpmeet, and you ought

to distinguish between the two matters.”  
(Rec., 242, 232, 225-226).

The amount of the verdict was \$10,500.00. In reversing judgment entered on this verdict for error in the parts of the charge above quoted, the opinion of Denison, Circuit Judge, for the Circuit Court of Appeals, is as follows (page 957) :—

“We find ourselves compelled to direct a new trial because of the measure of damages given to the jury. The parties beneficially interested were the widow and two small children. The case was tried before the decision of the Supreme Court in *Michigan Central R. Co. vs. Vreeland*, 227 U. S. 59, 33, Sup. Ct. 192, 57 L. Ed. 417, and the charge, as given disregarded, at least as to the widow, the distinctions pointed out between loss of support and maintenance and loss of companionship and association. We do not fail to observe that the loss of companionship and association was not put before the jury as an element of damages additional to the loss of support and maintenance quite as distinctly as had been done by the trial court in the *Vreeland Case*; but when we see that the references to the loss sustained by the widow’s deprivation of her husband’s companionship and association were repeated, that *the loss of home ties was referred to in a way to indicate its pecuniary importance, that the jury was told*

*that the law attempts to be liberal and not niggardly with the victims of such an accident and was not told to distinguish support from companionship\**, and when we see that the amount of the verdict would, at the legal rate of interest in Ohio, make a permanent annuity reaching well towards the amount which Niebel, out of his existing earnings, could have devoted to the support of his wife and family as distinguished from his own, we are convinced that the error in the charge on the subject of the widow's loss of association and companionship must be treated as prejudicial."

Our opponent in the Circuit Court of Appeals urged in his brief that it was not "possible for any reasonably intelligent jury to conclude from this instruction that" the mere relation was to be considered as an element of damage. Also our opponent urged in the same brief that it would seem to be idle, in the face of the correct part of the instruction that pecuniary loss should be the limit of recovery "to contend that any jury of ordinary intelligence could have possibly been misled as contended." But the Circuit Court of Appeals misunderstood the instruction for the opinion says:—

"But not only this reasonable expectation of greater voluntary service, but the legal ob-

\* *Italics ours.*



ligation of a husband and father to support his wife and children makes *his life of greater pecuniary value to them than the life of any other upon whom they might be dependent.*

In view of the general principle applied to the undisputed evidence in this case, that the deceased was a capable and industrious workman, devoted to his family and assiduous in the discharge of his domestic obligations, it cannot be said that there was error of law in the instruction that the *pecuniary injury to a wife and infant children from the death of the husband and father would be much greater than from the death of any other relative upon whom they might be dependent.*"

(Record, page 323.)

The Circuit Court of Appeals misunderstood the instruction to be a direction to the jury to compare *different lives*—a husband and father with "any other relative." The instruction actually did direct the jury to compare *different beneficiaries*—a widow and infant children with kin." Thus the instruction as understood by the Circuit Court of Appeals was less prejudicial, from the view-point of damages and of exciting unduly the sympathy of the jury on behalf of little children, than the instruction as actually given.

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\* Italics ours.

A jury could hardly have understood an instruction obscure to the Judges of the Circuit Court of Appeals. As the Circuit Court of Appeals did not understand the instruction, that Court could not have given adequate consideration to this error.

This Court has uniformly required of the trial courts clear and accurate instructions strictly conforming to the law in the administration of this important act: *Seaboard Air Line Ry. vs. Horton*, 233 U. S., 492. Plaintiff's Instruction No. 5 in the case at bar was obscure and misleading and was not founded upon any evidence in the case.

Respectfully Submitted,

McCORMICK & SMITH,  
F. MARKOE RIVINUS,  
THEODORE W. REATH,

*Attorneys for Norfolk and Western Railway Company.*

NOVEMBER, 1914.

**No. 516.**

**OCTOBER TERM, 1914.**

Office Supreme Court

FILED

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JAMES C. MA

**IN THE  
Supreme Court of the United States.**

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**NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff in Error,**

**vs.**

**SARAH E. HOLBROOK, Administratrix of W. T. Holbrook,  
Deceased, Defendant in Error.**

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**BRIEF IN REPLY ON BEHALF OF NORFOLK AND WESTERN  
RAILWAY COMPANY.**

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**McCORMICK & SMITH,  
F. MARKOE RIVINUS,  
THEODORE W. REATH,**

*Attorneys for Norfolk and Western  
Railway Company.*

**NOVEMBER, 1914.**



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In the Supreme Court of the United  
States.

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No. 516 of OCTOBER TERM, 1914.

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*Norfolk and Western Railway Company, Plain-  
tiff in Error,*

v

*Sarah E. Holbrook, Administratrix of W. T.  
Holbrook, Defendant in Error.*

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BRIEF IN REPLY OF NORFOLK AND  
WESTERN RAILWAY COMPANY.

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Our opponent, in his reply brief filed November 23, 1914, argues (but without quoting the statutes) that the interpretation of the Federal Employers' Liability Act is not involved in this case, and that this court has no jurisdiction.

The power of this Court to review the Circuit Court of Appeals in this case arises from Section



128 of the Judicial Code (the Act of Congress of 3 March, 1911, 36 Statutes at Large 1087):

“The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.”

and Section 241:

“In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.”

Sections 239 and 240 are the sections which govern the certification of questions by a Circuit Court of Appeals to the Supreme Court and the issue of a writ of certiorari by the Supreme Court to the Circuit Court of Appeals.

So by exclusion, all cases, except those expressly enumerated and excluded, (as to which the Circuit Court of Appeals is made final) may come to this Court on writ of error from the Circuit Court of Appeals.

Merely for purposes of comparison, we quote Section 237 which gives the jurisdiction to review State courts:—

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of, or an authority exercised under, the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is

against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

At page 6 our opponent argues that this case would have been dismissed if coming from a State Court because the error does "not involve the 'interpretation' or 'construction' of the" Statute, "but merely assailed the alleged academic inaccuracy" of the instruction as to the elements of pecuniary damage: and at page 9 he concludes that "the scope of review in this case ought not to be extended to embrace 'mere errors' said to consist of an 'obscure and misleading' paragraph of the instruction on the common law question of the measure of damages." In short, our opponent urges that plaintiff's instruction No. 5 was not an interpretation of the Federal Employers' Liability Act such as would give this Court jurisdiction to review the judgment of the Circuit Court of Appeals. In *Chicago Junction Railway Company vs. King*, 222 U. S., 222, the question for decision presented to this Court "was there any substantial evidence to go to the jury?" was a question of general law. In South-

ern Railway Company *vs.* Gadd, 233 U. S., 572, an action under the Federal Employers' Liability Act, the error was refusal of a peremptory instruction presenting only general questions of law of negligence not dependent on the interpretation of the Act. But in the case at bar the plaintiff's instruction No. 5 was an attempt on the part of the trial Court below to define to the jury the statutory beneficiaries entitled to recover under this Act and to instruct the jury upon the elements or factors of such beneficiaryship. In directing the jury to compare the widow and children, statutory beneficiaries under the Act, with hypothetical adult next of kin, and in directing the jury to give "much greater" damages to the beneficiaries in this case, the Court was interpreting the law for the jury, both as to the existence and the extent of their beneficiaryship.

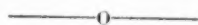
In *Michigan Central Railway vs. Vreeland*, 227 U. S., 59, this Court, after pointing out that at common law the right of action for an injury to the person is extinguished by death, then gave consideration to the Federal Employers' Liability Act and explained that that Act, as in the case of ~~cause of action for the purpose of compensating~~ Lord Campbell's Act and similar Acts in the States of the United States, should be "construed not as operating as a continuance of any right of action which the injured person would have

had but for his death, but as a new or independent *cause of action for the purpose of compensating* certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death." Again, this Court in that case said (page 70) that the action "is for the exclusive benefit of certain specified relatives," and that "the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." A correct charge to the jury defining the statutory beneficiaries and the elements of pecuniary damage to them calls for an interpretation of the law itself in a vital matter, as the beneficiaries and the pecuniary damage to them have no existence except as founded upon the law. To determine the beneficiaries in a given case it is necessary to know the correct elements of their loss as proven. Each correct element of pecuniary damage made the basis of a charge to the jury is to that extent an ascertainment of the existence of a statutory beneficiary and calls for an interpretation of the Statute.

In *Gulf, Colorado & Sante Fe Railway Co. vs. McGinnis*, 228, U. S., 173, the action was for a death under the Federal Employers' Liability Act. The State Court of Texas permitted a recovery (in part) for the benefit of a married daughter of the deceased living apart from her father at the time of the latter's death and not shown to have been

dependent upon him. This Court reversed the judgment for error in permitting her to share in the recovery. Her existence as a beneficiary depended upon the interpretation of the Act.

So in the case at bar the erroneous instruction was an interpretation of the Statute.



Our opponent objects that this instruction was not objected to as "obscure and misleading."

The instruction was obscure and misleading because of the erroneous comparison. To assign as our objection that the instruction was "obscure and misleading" would have been to state a result or conclusion instead of a reason; and would have given the Court and opposing counsel no opportunity to understand the objection and cure the error.

So also his objection, that the grounds of objection stated, did not include adults is not sound. The objection was to a comparison with "persons \* \* \* more distantly related." (Record, page 292) which includes adults.

Respectfully Submitted,

McCORMICK & SMITH,  
F. MARKOE RIVINUS,  
THEODORE W. REATH,

NOVEMBER, 1914.

**No. 516.**

Office Supreme Court, U. S.  
**FILED**  
OCT 10 1914  
**OCTOBER TERM, 1914.**  
JAMES D. MAHER  
CLERK

**IN THE  
Supreme Court of the United States.**

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**NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff in Error,**

**vs.**

**SARAH E. HOLBROOK, Administratrix of W. T. Holbrook,  
Deceased, Defendant in Error.**

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**ANSWER AND BRIEF OF NORFOLK AND WESTERN RAILWAY  
COMPANY TO MOTION AND BRIEF OF WILLIAM H. WERTH,  
Esq., COUNSEL FOR DEFENDANT IN ERROR, TO AFFIRM  
THE JUDGMENT, TO IMPOSE DAMAGES AND TO PLACE  
THE CASE ON THE SUMMARY DOCKET.**

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**McCORMICK & SMITH,  
F. MARKOE RIVINUS,  
THEODORE W. REATH,**

*Attorneys for Norfolk and Western  
Railway Company.*

**OCTOBER 12TH, 1914.**

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In the Supreme Court of the United  
States.

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OCTOBER TERM, 1914. No. 516.

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*Norfolk and Western Railway Company, Plain-  
tiff in Error,*

vs.

*Sarah E. Holbrook, Administratrix of W. T.  
Holbrook, Deceased, Defendant in Error.*

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ANSWER AND BRIEF OF NORFOLK AND WESTERN  
RAILWAY COMPANY TO MOTION AND BRIEF OF  
WILLIAM H. WERTH, ESQ., COUNSEL FOR DE-  
FENDANT IN ERROR, TO AFFIRM THE JUDGMENT,  
TO IMPOSE DAMAGES AND TO PLACE THE CASE  
ON THE SUMMARY DOCKET.

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In this case Counsel for the Defendant in Er-  
ror, William H. Werth, Esq., of Tazewell, Vir-

ginia, has submitted to the Court on this the first day of the October Term a motion and printed brief in support thereof, which motion we shall divide for purpose of answer into its three several parts, namely:

*First.*—To affirm the judgment below under Rule 6, Sub-division 5, on the ground that the writ of error was taken for delay only or was frivolous:

*Second.*—To impose damages not to exceed ten per cent. in addition to interest under Rule 23, Sub-division 2:

*Third.*—To transfer the case to the Summary Docket under Rule 6, Sub-division 5 (6).

The point on which this case is in this Court on writ of error requires a construction of the legal meaning and effect of a federal statute—the Federal Employers' Liability Act—in respect of a vitally important matter of the administration of that Act, namely: the proper instruction of the jury as to the elements which constitute the pecuniary damages that alone are recoverable under that law for a given life by the various beneficiaries named in the Act.

*First.*—THE WRIT OF ERROR PRESENTS FOR DECISION A QUESTION NOT HITHERTO CONCLUDED BY PREVIOUS AUTHORITY CONCERNING THE INTERPRETATION OF THE FEDERAL EMPLOYERS' LIABILITY ACT, AND IS NOT FRIVOLOUS.

Mr. Chief Justice White, in *Deming vs. Carlisle Packing Company*, 226 U. S., 102, stated the rule "to be settled that on a motion to dismiss, it is the duty of the court to consider whether an asserted Federal question is devoid of merit and unsubstantial, either because concluded by previous authority, or because of its absolutely frivolous nature."

By his motion Mr. Werth asks this court to dismiss the appeal of the Railway for that the appeal is frivolous and taken for the purpose of delay only. The Railway here complains of the giving by the trial court to the jury of an instruction that they should give the decedent's widow and infant children "much greater" damages than hypothetical adults or next of kin. (Plaintiff's Instruction No. 5, Record, Page 291.) This court has not treated such appeals as frivolous. In construing the Federal Employers' Liability Act of 22 April, 1908, as amended by the Act of 5 April, 1910, this court has uniformly confined recovery thereunder to pecuniary damage to the beneficiaries named in the Act. Re-

versals have been necessary of decisions of subordinate tribunals, state and federal, for a failure to recognize in the instructions of the court to the jury and otherwise that only pecuniary damage supported by evidence may be recovered:

M. C. R. Co. *vs.* Vreeland, 227 U. S. 59:

Am. R. R. Co. *vs.* Didriksen, 227 U. S.,  
145:

G., C. & S. F. R. Co. *vs.* McGinnis, 228 U.  
S. 173.

The instruction here complained of erroneously directed a comparison between beneficiaries who were before the Court and hypothetical beneficiaries who were not in the case at all. The jury was told to give "much greater" damages than in some hypothetical case not before them and of which they could only judge by their "experiences as men"—a method of arriving at damages by speculation of the jury condemned in Michigan Central R. R. Co. *vs.* Vreeland, 227 U. S., 59. If the case under trial had been that of a crippled adult next of kin who had been by the decedent's death deprived of support as shown by the evidence, it would have been error to instruct the jury that such a beneficiary was entitled to *much smaller* damages than a widow or minor child. Of course the rule of damages differs according to the relation between

the beneficiaries who are the parties plaintiff and the decedent, and, therefore, the proofs, in order to determine the pecuniary damage in a given case, must always show that relationship. But this does not justify an instruction which is erroneous in directing the jury to make an impossible comparison unsupported by evidence. This Court has required clear and accurate instructions strictly conforming to the law in the administration of this Act: *Seaboard Air Line vs. Horton*, 233 U. S., 492.

Moreover the instruction was obscure and misleading. The Circuit Court of Appeals misunderstood the instruction to be that "the pecuniary injury to a wife and infant children from the death of the husband and father would be much greater than from the death of any other relative upon whom they might be dependent:" (See opinion as reprinted in Mr. Werth's brief, page 7.) Would an instruction which the Circuit Court of Appeals did not understand be understood by a jury? This is another question arising under Plaintiff's Instruction No. 5 which this Court will consider when the case is argued.

To the error in this instruction the Circuit Court of Appeals could not have given adequate consideration, as that Court misunderstood the

instruction to be a mere comparison of the value of certain adult lives instead of a direction to give a much larger verdict to beneficiaries supposed to be more helpless (children, etc.,) than to others. Thus the instruction as understood by the Circuit Court of Appeals was less prejudicial from the view-point of damages and of exciting unduly the sympathy of the jury than the instruction as actually given.

In a matter of the general law of negligence not requiring an interpretation of a federal statute this Court would not review the Circuit Court of Appeals. The cases cited by Mr. Werth are cases which, although recovery was sought upon some federal law, did not call for any interpretation of that law. A recent exposition of the limit of the jurisdiction of this Court in such an appeal from a Circuit Court of Appeals is *Southern Ry. Co. vs. Gadd*, 233 U. S., 572. There the action was under the Federal Employers' Liability Act but the only error which was substantial was the refusal of a peremptory instruction which presented nothing more than general questions of the law of negligence not dependent upon the interpretation of the Act. Mr. Chief Justice White said that "the assertion that the interpretation of the statute was here involved" was not supported. In the case at bar the statute

must be interpreted in deciding whether or not the Plaintiff's Instruction No. 5 was erroneous, in explaining to the jury the elements of that pecuniary damage which alone is recoverable under the Act of Congress.

That the error in this instruction was prejudicial is, as we view the record, manifest from the size of the verdict, \$25,000.00, for the life of a bridge carpenter whose earnings devoted to the support of his family did not exceed (see opinion of the District Judge, Record page 297) \$750.00 per annum.

*Second.*—AS THE WRIT OF ERROR WAS NOT TAKEN FOR DELAY OR FRIVOLOUS THE MOTION FOR DAMAGES SHOULD BE DENIED.

The plaintiff in error will not be penalized on the ground that the writ of error was for delay or frivolous for raising so important a question of interpretation of a Federal Statute.

*Third.*—THE MOTION TO TRANSFER THE CASE TO THE SUMMARY DOCKET SHOULD BE GRANTED.

The question whether Plaintiff's Instruction No. 5 was erroneous and constituted reversible error is the only question we desire to present to this Court. Only the assignments of error (num-

bered 1, 2 and 3, Record pages 325-327) which present this question will be pressed in our brief at the oral argument. This question of law is, as we conceive, of importance not only to the litigants in this case but to that section of the public which is interested in the due and orderly administration of the Federal Employers' Liability Act. But though the question is important, it is a compact question of law and can and should be argued both on briefs and in oral argument within short compass. We, therefore, do not oppose but join in the motion of Mr. Werth to place this case on the Summary Docket for early hearing under the half-hour rule—Rule 6, Subdivision 6.

Respectfully Submitted,

McCORMICK & SMITH,  
F. MARKOE RIVINUS,  
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OCTOBER 12th, 1914.



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MOTION TO AFFIRM

In the Supreme Court of the  
United States

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October Term, 1914.

No. 516.

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NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff In Error,

vs. | Writ of Error

SARAH E. HOLBROOK, Administratrix of W. T. Hol-  
brook, Deceased.

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In Error to the Circuit Court of Appeals, Fourth Circuit.

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STATEMENT.

(Parties Styled Plaintiff and Defendant as in Trial Court.)

Plaintiff instituted this action under the Federal Employer's Liability Act of 1908, in the District Court of the United States for the Western District of Virginia; there was a verdict for the plaintiff which defendant moved the court to set aside, which motion the court overruled and filed an opinion as a part of the record in which all the questions raised on the motion were carefully considered. Defendant reserved three exceptions—the first to the refusal of the court to direct a verdict for defendant, one to an instruction based on the facts, and a third to the in-

struction as to the measure of damages. Upon these three assignments of error it sued out a writ of error and took the case to the Circuit Court of Appeals, where it was affirmed May 9, 1914, in a full opinion concurred in by all the judges. Thereupon defendant brought the case here upon a second writ of error for review in this court, the assignments of error being the same urged in the court below.

Plaintiff now appears and files this as her motion and brief to put this case on the summary docket and affirm the judgment of the court below under sub-division 5 of rule 6 of this court, upon the ground that it is manifest that this second writ of error was taken for delay only; that the questions raised are so "frivolous" as not to need further argument; and because, if there be any question raised which cannot be said to be "frivolous," it is one which has been repeatedly and "explicitly" decided by this court before this second writ of error was sued out and therefore is foreclosed in this court.

As we understand recent decisions of this court, when the act of the Congress in question "is made a ground for bringing up ordinary questions of negligence, (this court will) deal with them in a summary way," and that, although this court has jurisdiction by virtue of the statute, yet such questions, "in a broad sense, are of a character which ordinarily it was the purpose of the judiciary act of 1891 (26 Stat. at L. 826, Chap. 517, U. S. Comp. Stat. 1901, p. 488), to submit to the final jurisdiction of the circuit court of appeals," and that for this reason this court will reverse only for "plain error" which plainly prejudiced the party bringing the case to this court. (*Chicago etc. R. Co. v. King*, 222 U. S. 222, 32 Sup. Ct. 79; *Texas etc. R. Co. v. Howell*, 224 U. S. 577, 32 Sup. Ct. 601; *Chicago etc. R. Co. v. Brown*, 229 U. S. 217, 33 Sup. Ct. 840; *Southern etc. R. Co. v. Bennett*, 230 U. S. , 34 Sup. Ct. 566).

We also understand from the decision of this court in *Chicago etc. R. Co. v. Brown*, (*supra*), that where the judg-

ment complained of has been affirmed in the circuit court of appeals and the facts are stated in its opinion, the facts so stated "must be accepted" in this court as established in reviewing the action of the trial court in refusing to direct a verdict.

For this reason we deem it wholly unnecessary to make any further statement of the facts relied on as tending to show the proximate negligence of defendant, and, therefore, that the trial court was not in error in refusing to direct a verdict, than is contained in the opinion of the Circuit Court of Appeals. We insert the whole of that opinion dealing with the three assignments of error.

#### OPINION OF CIRCUIT COURT OF APPEALS.

"2. On the merits it is contended that the District Judge should have directed a verdict for the defendant on the ground that the evidence was insufficient to warrant the inference of negligence on the part of the defendant as a proximate cause of the death of Holbrook.

"When Holbrook was killed he in company with five other men under the directions of the foreman Carbaugh was putting down guard rails on the westbound track of a double-tracked bridge 228 feet long. Within fifty feet of the west approach of the bridge there is a curved tunnel, and near the east approach there is another curve in a cut. Trains passed frequently, and those coming from the west through the tunnel drew the smoke over the bridge. These conditions made the place of work one of great danger, requiring on the part of the defendant corresponding care in the protection of its men. Recognizing this duty in such conditions the railroad company required of its foremen the observance of these rules:

" 'Foremen or others in charge of employees working on or about the tracks must instruct their men to be alert, watchful, and to keep out of danger; and will take all reasonable precautions to see that all men working under

their immediate supervision receive warnings of approaching trains in time to reach a place of safety.

"When working on tracks in places where approaching trains cannot readily be seen because of permanent obstructions to the view, or temporary obstructions, such, for instance, as fog, storms, snow or engines or cars, extra precautions must be taken to warn the men of approaching trains.

"As an extra precaution, when necessary to place a watchman at some distance from the men at work on the tracks, or in such location that his signals may not be understood, additional watchmen should be placed so that the signals can be passed to the men at work and return signals obtained. In case return signals are not received and understood, the watchman must signal the train to stop."

"Carbaugh, the foreman, took no other precautions than to stand on the eastbound track and call "railroad" or "clear up" on observing the approach of a train. In this situation westbound passenger train 15 passed, with signals that another section was to follow. Several hours afterwards eastbound freight train 92, carrying about forty cars, came through the tunnel pulling smoke over the bridge. Before all the cars had cleared the bridge, the second section of westbound passenger train 15 approached from the curve on the east side on the track where Holbrook was working, and killed him. Carbaugh's range of vision on the track towards this train was not more than three or four hundred feet, which would be run by a train going thirty miles an hour in not exceeding ten seconds. When the foreman made the call for train 92, Holbrook and the witness Walters were engaged in framing a new guard rail on the westbound track, and between that call and the approach of train 15, it was necessary for Holbrook and Walters to take the timbers off the track and get to a place of safety on the girders or floor beams beyond the track. No witness saw Holbrook when he was struck, and there is some conflict in the evidence as to his situation when train

15 was about to reach his position, but the conflict is not material. Taken together the evidence leaves no doubt that Holbrook was struck either while he was in the act of removing a piece of timber from the track or immediately after removing it and before he reached a place of safety.

"This short statement of the admitted conditions and the precautions taken by Carbaugh is enough to show clearly that there was good ground for the jury to infer that the precautions were not such as due care required, and that in anticipation of the danger to which the workmen would be subjected from the contingency of two trains approaching the bridge at the same time from opposite directions, Carbaugh should have protected them by flags. The motion to direct a verdict was therefore properly refused.

"3. The defendant charges error in an instruction that the verdict should be for the plaintiff if the jury found that Holbrook's death was due to the negligence of any of defendant's servants other than Carbaugh, when there was no evidence of negligence of any other employee. The expression, "other agents or employees" used in the charge clearly meant agents or employees other than Holbrook himself, and therefore was proper since it excluded Holbrook and included Carbaugh.

"4. After charging the jury that the recovery, if any, was to be measured by the pecuniary loss suffered by the widow and children as the direct result of the death of the husband and father, and that damages for sorrow and loss of love or other purely sentimental injury could not be allowed, the District Judge gave the following instruction which is assigned as error:

" 'However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between de-

ceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages.' "

"In construing the statute of 1885 applicable to the District of Columbia, the Supreme Court of the United States said as to the measure of damages:

" 'Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to maintain themselves and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance.' *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72.

"In the course of full discussion of the subject in *Michigan, etc., R. Co. v. Vreeland*, 227 U. S., 59, the court after emphasizing the rule that the recovery must be limited to pecuniary loss from the death continues: 'The rule for the measurement of damages must differ according to the relation between the parties plaintiff and decedent, 'according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled. *Tiffany Death by Wrongful Act*, sections 158, 160, 161, 162.' Difference in the value of prospective support, and intellectual, moral, and physical training to be expected from a father or mother, and from any other benefactor inheres in the nature of social relations. While no compensation can be given for the loss of love, yet in estimating the pecuniary value of expected maintenance and training, the fact cannot be ignored that it will be increased in proportion to the

intelligent solicitude which prompts the service, and that therefore maintenance of a wife by her husband and maintenance and training of children by their father will, as a rule, be of greater value than like service from other kindred. This difference is clearly implied in the case last cited. In recognition of the principle it has been held that in estimating damages for death of a husband the legal obligation to support is not the sole factor, and that alienation of affection, separation, strained relations and contemplated divorce proceedings might be proved and should be considered by the jury in favor of the defendant. **Fogarty v. Northern Pacific Ry. Co.**, 133 Pac. (Wash.) 609; **Farley v. New York, N. H. & H. R. Co.**, 87 Atl. (Conn.), 990.

"But not only this reasonable expectation of greater voluntary service, but the legal obligation of a husband and father to support his wife and children makes his life of greater pecuniary value to them than the life of any other upon whom they might be dependent. In view of the general principle applied to the undisputed evidence in this case that the deceased was a capable and industrious workman, devoted to his family and assiduous in the discharge of his domestic obligations, it cannot be said that there was error of law in the instruction that the pecuniary injury to a wife and infant children from the death of the husband and father would be much greater than from the death of any other relative upon whom they might be dependent.

**Affirmed."**

The only error assigned which we shall discuss and the only one which we understand is to be urged in this court, is to the action of the court in giving instruction 5 as to the measure of damages. While only one paragraph of this instruction has been attacked either in the trial court or in the Circuit Court of Appeals, we deem it proper to quote here the whole of it, as the purpose of the paragraph objected to is better understood when read in the



light of its context. That part of the instruction objected to is printed in *italics*.

"The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss. **However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages.** Bearing the above principles in mind the jury should assess such damages, not exceeding \$40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

"(1). What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he

was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed, and in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

"(2). The jury will also take into consideration the care, attention, instruction, training, advice, and guidance, which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefits therefrom to said children, and include the pecuniary value of the same in the damages assessed."

After quoting this italicized sentence in its brief in the Circuit Court of Appeals, defendant's counsel admit that "In other parts of the instruction the court gave directions to the jury mainly correct—that the pecuniary value of the life should guide them."

As near as we can tell, the ground of objection to this sentence is that it was misleading. We do not understand defendant's counsel to question the correctness of the legal principle stated; on the contrary we understand them to admit the soundness of the principle as stated, and that this is established by the decisions of this court in *B. & P. R. Co. v. Mackey*, 157 U. S. 72, 39, L. Ed. 624, 632, and *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33, Sup. Ct. R. 192. In order that defendant's position and its contentions with reference to its objections to this instruction may be clearly before this court on this motion, in defend-

ant's own language, we quote the following from its reply brief filed in the Circuit Court of Appeals in this case, pp. 5 and 7.

"Our objection on this phase of the instruction was that it might with reason have been understood by the jury to be a permission to them to capitalize loss of society, companionship and acts of kindness, which cannot be converted into money.

"We did not ask an instruction and we do not contend that the jury had no right to consider the relation of parent and child. That relation was necessarily in the case and was a foundation of the suit. Nor did we ask any instruction that the jury should ignore that relation."

"It would be a sufficient answer to this citation from the opinion of Mr. Justice Harlan (*B. & P. R. Co. v. Mackey*, supra), and also to the similar citation \* \* from *Michigan Central Railroad v. Vreeland*, 227 U. S. 59, (to say) that a general and correct statement of the law must not be charged to a jury in a case wherein the evidence does not present the factors charged upon."

We submit that the instruction would have been misleading had the first sentence not been followed by some statement of the principle found in the sentence objected to. It will be observed that the first sentence in clear terms limits the recovery to the "pecuniary injury;" and, not content with this, it proceeds to tell the jury that it is not "permissible" for them to "go beyond the pecuniary loss and give damages for the loss of love" etc. Had the following sentence, which is objected to, been omitted, the first sentence "might with reason have been understood by the jury" as a peremptory instruction not to "consider the relation of parent and child," and that they should "ignore that relation;" that such a view, looking alone to the first

sentence, would have appeared to the jury *prima facie* correct, we think much more probable than that they could have inferred "permission" under the sentence objected to, "to capitalize loss of society, companionship and acts of kindness," in the face of the express statement of the preceding sentence that such capitalization was not "permissible."

But, even though the jury might not have been misled by the omission of the sentence objected to, we insist that it was proper for the court, under the evidence in this case, to so charge. The principle stated in the language objected to was as applicable under the evidence and as well established by the authorities, as that declared in the preceding or any other part of the instruction, and the principle stated in the first sentence would not have been complete without that stated in the sentence following.

Immediately following the language objected to the jury were told to bear the "above principles in mind" and assess the damage for all "pecuniary" loss; and then they were told in paragraphs (1) and (2) specifically what they "should consider" in fixing the amount, and it is admitted that both of said paragraphs are "correct," and we insist that it is not conceivable that any intelligent jury could have been misled by this instruction or any part of it, to "capitalize loss of society, companionship and acts of kindness."

It would seem from the quotation taken from defendant's brief in the Circuit Court of Appeals, (*supra*), that it contends that the language objected to, is "a general and correct statement of the law" under the authority of the **Mackey case** and **Vreeland case**, but it is intimated that the evidence in this case does not "present the factors charged upon." The evidence is unusually full and is undisputed. It was proved that intestate was the "husband and father" of the "widow and infant children." Witness Stallard and others testify that intestate was "considered a very intelligent man and a good citizen," and that he had "a fairly good education;" that, at the same time he was working

for defendant, he was also engaged as a partner in a "mercantile business;" that he was thrifty, economical, and a good business man; that his habits were exemplary and his character high; that he devoted his spare time to his wife and children and to teaching the latter their lessons and in bringing "them up in the way they should come up," being "solicitous and ambitious" for them and taking a great "interest in their welfare along educational lines;" his widow, being asked about his habits and character as "husband and father," summed them up in an answer of three words and said: "He was good." It is proved that he took his wife to Mr. Roosevelt's inauguration and had arranged to take her and his oldest boy to Mr. Wilson's inauguration, but his death intervened and prevented it; that he had purchased and paid for a nice home in the city of Bluefield with the expressed purpose of moving his family there in the near future so that they would be nearer his work and to give them better social and educational advantages, and that his surviving family, (for whose benefit this act of the Congress was expressly enacted), consisted of his widow and five infant children, the oldest of whom, at the date of his death, was 14 and the youngest one year old. In the opinion of the trial court, filed on the motion to set aside the verdict, and made a part of the record, it was said:

"The father would have supplied to the intellectual and moral training of his children an unwearied, long-continued and most conscientious effort, inspired not only by his love for them, but by his evidently strong ambition for their success in life. The children have lost the guidance of an intelligent, conscientious, and ambitious father." Upon the same subject the Circuit Court of Appeals said that the "\* \* \* undisputed evidence in this case is that the deceased was a capable and industrious workman, devoted to his family and assiduous in the discharge of his domestic obligations, \* \* \*"

These facts are undisputed, but, if they were, the concurrent findings of the two lower courts conclusively establish them. Defendant, in saying that in this case the "evidence does not present the factors charged upon," can only mean that the foregoing evidence did not tend to prove the "pecuniary value" of intestate's services to his family in terms of dollars and cents; in other words, that plaintiff should have proved intestate's competency and ability to perform the services and that he did in fact perform them, and then, in addition, what the continued performance of those services would have been worth in dollars and cents to the several beneficiaries. We submit that such a contention is wholly untenable and "frivolous;" that after plaintiff proved the kind of services intestate was competent to perform and that he did in fact perform those services, it was then the sole province of the jury to determine what the "pecuniary value" of the continued performance of those services would have been in dollars and cents, and that this was the very issue submitted to the jury under this evidence and instruction. That, in the very nature of things, it was impossible for plaintiff to prove more. The only possible way to have done so would have been to have put a witness on the stand and had him state his opinion as to the "pecuniary value" of such services in dollars and cents; that such a witness would have been performing the functions of the jury is too self evident for argument. Yet this is the only conceivable explanation of defendant's contention that in this case the "evidence does not present the factors charged upon." That such contention is wholly without support is shown by defendant's objection which was confined in both courts below, to one particular sentence in the instruction; whereas the absence of the "factors charged upon" would be ground for objecting to the whole instruction applicable to the "factors" not proved. Especially paragraph "(2)."

If the language objected to was not misleading and was sufficiently supported by relevant evidence, the only

remaining inquiry is—Was the legal principle stated sound and supported by authority?

The learned judge of the trial court overruled the objection in question upon the "explicit" authority of this court in "**R. Co. v. Vreeland**" and "**R. Co. v. Mackey**," (supra), both of which he cites in his opinion in the record, among other authorities. The Circuit Court of Appeals quotes the language of the instruction which is objected to, and then cites and quotes from the Mackey and Vreeland cases as direct and conclusive authority in support of it. Indeed, the language objected to is almost identical with the language of Mr. Justice Harlan in the Mackey case, construing a statute of the District of Columbia which, in so far as it governed the amount or elements of damage, is practically identical with the Act of the Congress sued on here. In the Mackey case the trial court had instructed the jury that they could and should consider decedent's "family—who they are and what they consist of" and to fix the damage at what this "family" will "probably lose by his death." This charge was objected to upon the supposed authority of **Penn. R. Co. v. Roy**, 102 U. S. 451, which was an action for personal injuries brought by the injured party himself under the general law of master and servant. This court, speaking through Mr. Justice Harlan, clearly distinguished the Mackey case, and pointed out that the action in that case was brought under a statute enacted exclusively for the benefit of decedent's "family," which is equally true of the Federal Employer's Liability Act. Mr. Justice Harlan then proceeds to dispose of the objection to the charge in the Mackey case as quoted in the opinion of the lower court in this case.

In the case of **Michigan Cent. R. Co. v. Vreeland**, (supra), this court, speaking through the lamented Mr. Justice Lurton, decided that the act of the Congress in question was "essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict. chap. 93, known

as Lord Campbell's Act." Proceeding, after a full examination of a large number of authorities, he stated the principle quoted in the opinion of the lower court in this case.

That the "pecuniary" injury, even if we look alone to the benefits to which they are "legally entitled," of a "dependent widow and infant children of a deceased husband and father," caused by his wrongful death, are "much greater" than would be the injury to "adults," (even if children), "or dependents who were mere next of kin," (whether adults or infants), is decided in express terms in the Mackey case, and is a self evident truth known to all men; and this being true it follows inevitably, as declared by Mr. Justice Lurton, that "the relation between the parties plaintiff and the decedent" is, as stated in the instructions, a necessary "factor" to be considered in measuring the damages. So clear is it that the loss of a dependent widow and infant children from the death of a husband and father would be "much greater" than the loss of "mere next of kin," that, in the case of *Stewart v. Balt. & O. R. Co.*, 168 U. S. 445, 42 L. Ed. 537, 539, Mr. Justice Brewer stated the converse of the same proposition as a matter of course and common knowledge, namely that "the remote relatives can seldom, if ever, be regarded as suffering loss from the death." And the statute itself recognizes the same fact by making a "surviving widow" and "children" preferred beneficiaries over all others.

The *Vreeland* case was one of a series of cases decided by this court about the same time, including *American R. Co. v. Didricksen*, 227 U. S. 145, 33 Sup. Ct. R. 224; and *Gulf etc. R. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. R. 426. In the *Didricksen* case the action was for the benefit of parents for the death of an unmarried son; in the *McGinnis* case it was for the death of a father for the benefit of his widow and children, one of the latter being a married daughter who lived with and was supported and maintained by her husband and was in no wise dependent upon decedent or had any reasonable expectation of any pecu-



niary benefit from his continued life. The trial court was asked to instruct that no damage could be assessed for the benefit of this married daughter, which it refused to do. In both of these cases the trial court proceeded upon the theory that the domestic relation which had previously existed between the beneficial plaintiffs and the decedent was a basis for the recovery of damages without "allegation or evidence" in either case, (as this court expressly stated), that the former had "been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee." These two cases are illustrations of the principle stated in the instruction objected to here, and in the language of Mr Justice Lurton in the Vreeland case, that "The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent," and show that the "relation" is important and a "factor" or element of damages, only when it tends to establish a "reasonable expectation of pecuniary benefits" from the decedent to the beneficial plaintiffs of which they have been deprived by his wrongful death.

It will be observed that the assignment of error and grounds of objection to the instruction in the case at bar, is wholly different from that upon which this court expressly acted in the three cases referred to; for in the Vreeland, Didricksen, and McGinnis cases, the instructions were expressly held to be bad because and only because, there was neither "allegation or evidence" in either case to base it on. No such contention can be sustained in this case, not only because the evidence is full and clear as to the reasonable expectation of pecuniary benefits from the continued life of decedent, but because the exception reserved and the assignment based on it only goes to the soundness of the abstract principle stated in the paragraph objected to— that it was error to so charge in any case without any regard to what the evidence was, and not that there was no sufficient evidence to support it.

While we are fully satisfied that the correctness of the instruction in question is sustained by the decisions of this court, and that no other authorities could add to the weight of those decisions; yet, for the purpose of this motion and as tending to show that this writ of error was sued out for "frivolous" reasons, it is pertinent to show that defendant's counsel were unable, out of the wilderness of cases, state and federal, passing on the measure of damages in such cases, to cite in their briefs in the Circuit Court of Appeals but three cases which they claimed supported their objections to this instruction. Of these three cases, (each of which was also cited in the trial court), one did not, as the writer reads it, touch the question even remotely and the other two were regarded as direct authorities in support of the instruction and were cited and relied on in the Circuit Court of Appeals for plaintiff and are cited in the opinion of that court as sustaining the instruction. We think this fact of sufficient importance, in support of this motion, to warrant an analysis of the three cases in order that this court may see just what support defendant's contention has. The cases are: **Walker v. Michigan Cent. R. Co.**, (Mich. 1897), 69 N. W. R. 1114; **Farley v. New York etc. R. Co.**, (Conn. 1913), 87 Atl. R. 990; **Fogarty v. Northern Pac. R. Co.**, (Wash. 1913), 133 Pac. R. 609.

The single syllabus in the Walker case is as follows:

"In a statutory action to recover for death by wrongful act, it is error to allow the jury to consider damages sustained by decedent's children from the loss of nurture, instruction, and moral and physical training received from the father, of the value of which **there was no evidence.**" (*Italics writer's*).

This syllabus states the sole point in the case as shown by the opinion of the court. We are unable to see that this case touches in the remotest way the question here. That

it does not would seem to be conclusively established by the fact that the paragraph of the instruction marked "(2)" (the identical element of damage before the Michigan court in the above case), is not only not objected to but was admitted in defendant's brief in the Circuit Court of Appeals, to be "mainly correct" and therefore applicable under the "evidence" in this case. Both of the other cases were actions brought in the state court under the Federal Employer's Liability Act for the benefit of surviving widows and children of the deceased employees; in both cases the domestic relation existing prior to the employee's death between he and the suing beneficiaries, had been severed for several years and the surviving widows and children had been abandoned by their respective husbands and fathers who had been contributing nothing to the former's support during that time, and there was no evidence tending to show that either of the beneficiaries had any "reasonable expectation of pecuniary benefit" from the continued life of their decedent. In the **Farley case** the trial court excluded all evidence tending to show the actual "relation" and in the **Fogarty case** the trial court treated the actual "relation" as not a material "factor" in the case, and both trial courts instructed the jury accordingly. In the state appellate courts both cases were reversed for this reason, in each case the **Vreeland, McGinnis and Didricksen cases** being cited as authority. In the **Farley case** the opinion of Prentice C. J. is so direct an authority for the instruction now before this court that we cannot refrain from quoting the following paragraph, (87 Atl. R. at p. 993):

"The recovery is strictly limited to compensation for the pecuniary loss to the beneficiaries and can comprehend no other. Such being the rule, it follows that the amount recoverable in given cases must be influenced by the nature of the relation between the beneficiaries and the deceased, the obligations, moral or legal, naturally incident to such relation, the extent of the re-

cognition which the deceased made of that obligation, his financial ability to make such recognition, his disposition to do so, as shown by experience, and the thousand and one circumstances calculated to throw light in some substantial way upon the reasonable expectation of benefits, of which the beneficiaries were deprived by death. 'The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled' (Mich. Cent. v. Vreeland, 227 U. S. 59, 72, 33 Sup. Ct. 192, 197, '57 L. Ed. ) See also Fithian v. St. L. & San F. R. R. Co. (C. C.) 188 Fed. 842, 844."

We, therefore, feel well warranted in the statement that, not only is the objection in question in this case upon which this second writ of error is based, in the face of the "explicit" decisions of this court, but that defendant's counsel have prosecuted this second writ of error without being able to cite a single case from any other court, state or federal, which would even give color to their objection, and save it from the charge of being "frivolous."

We, therefore, move this court to affirm the judgement below under Rule 6, sub-division 5, and upon the authority of the following cases: *The City of Chanute v. Trader*, 132 U. S. 210, 33 L. Ed. 345, 10 Sup. Ct. 67; *Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 36 L. Ed. 506; *Richardson v. L. & N. R. Co.* 169 U. S. 128, 42 L. Ed. 167, 18 Sup. Ct. 268; *Blythe v. Hinckley*, 180 U. S. 338, 45 L. Ed. 557, 561, 21 Sup. Ct. 390; *New Orleans etc. v. Louisiana*, 185 U. S. 336,

345, 46 L. Ed. 936, 941, 22 Sup. Ct. 691; *Equitable Life Ins. Co. v. Brown*, 187 U. S. 308, 47 L. Ed. 190, 22 Sup. Ct. 308, 315; *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 33 Sup. Ct. 80; *Guardian Ass. Co. v. Quintana*, 227 U. S. 100, 33 Sup. Ct. 236.

We also invoke and move the court to apply Rule 23, sub-division 2, and impose on defendant "damages at a rate not exceeding 10 per cent., in addition to interest" because of the delay it has caused by prosecuting its "frivolous" writ of error. If the "unsubstantial and frivolous character" of the questions brought to this court for review, after they had been unanimously disposed of in a full opinion by the Circuit Court of Appeals, be established, the conclusion that the second writ of error was sued out for "delay" follows as a necessary conclusion of law, (*Deming v. Carlisle Packing Co.*, *supra*). As far back as 1889 this court said, in *The City of Chanute v. Trader*, (*supra*):

"Our experience teaches us that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

This writ was sued out, as it seems to us, not with the hope of getting justice by a reversal, but with the intent to hinder and obstruct justice by delay. The common carriers of the country should not, we respectfully submit, be allowed to pervert the process of this court into a "Big Stick" with which to coerce the "dependent" beneficiaries of employees killed in their service, into settling their rights under this statute upon such terms as they can get, as the only alternative by which they may hope to escape the delay, expense, vexation, uncertainty, and the "hope de-

ferred," necessarily incident to litigating such rights in two appellate courts after they have been established in a fair trial. Especially is this true when, as in the case at bar, the question sought to be reviewed does not involve the interpretation of this particular statute in any way which would distinguish it from any one of the many statutes in this country modeled after Lord Campbell's act, no provisions of which have been construed by the state and federal courts oftener than that which controls the measure of damages for wrongful death. As was said by this court in the *City of Chanute v. Trader*, (*supra*), the only way to check a policy on the part of the railroads to bring every such case here without regard to its merits, in order to make the remedy given by this statute so burdensome to the "dependent" beneficiaries as to discourage all such litigation, is for this court to exercise its power under its Rule to "award damages" in order to "discourage frivolous" writs of error. As it seems to us, this is distinctly a proper case for the exercise of that power and we respectfully invoke it.

Should this court find that we are in error in contending that the questions assigned are "frivolous" and that defendant is entitled to a full hearing, then we ask that this cause be advanced on the court's docket in order that such hearing may be speedy.

This court said in *Ex parte Robinson*, 19 Wall. 513, 514, 22 L. ed. 205, that "cases involving great hardship are frequently brought here for revision, and in such cases it is competent for the court to advance the same on motion." We can conceive of no greater hardship than that the "dependent" beneficiaries recovering judgments under this statute should have their cases brought here from the circuit court of appeals and held heretotake their regular course, involving a year or more in addition to the time it took the case to get here.

The transcript of the record in this case not having been printed at the time this motion is prepared, we have

deemed it expedient and proper to print along with the motion, such parts of the record as would require inspection and consideration in order to pass on the motion. Affidavit of the service of notice of this motion as required by Rule 6, sub-division 4, is filed with the clerk of this court, along with 30 printed copies hereof.

Respectfully submitted,

SARAH E. HOLBROOK,

Administratrix of W. T. Holbrook, Deceased,

By William H. Werth, Her Attorney.

WILLIAM H. WERTH,

Tazewell, Virginia.

Counsel for Sarah E. Holbrook, Administratrix  
of W. T. Holbrook, Deceased.

AUGUST, 1914.

OFFICE SUPREME COURT, U. S.

FILED

NOV 23 1914

JAMES D. MANER

CLERK

**REPLY BRIEF.**

**No. 516.**

**October Term, 1914.**

**IN THE**

**Supreme Court of the United  
States**

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**NORFOLK AND WESTERN RAILWAY COMPANY,  
Plaintiff In Error,**

**vs.**

**SARAH E. HOLBROOK, ADMINISTRATRIX OF W. T.  
HOLBROOK, Deceased, Defendant In Error.**

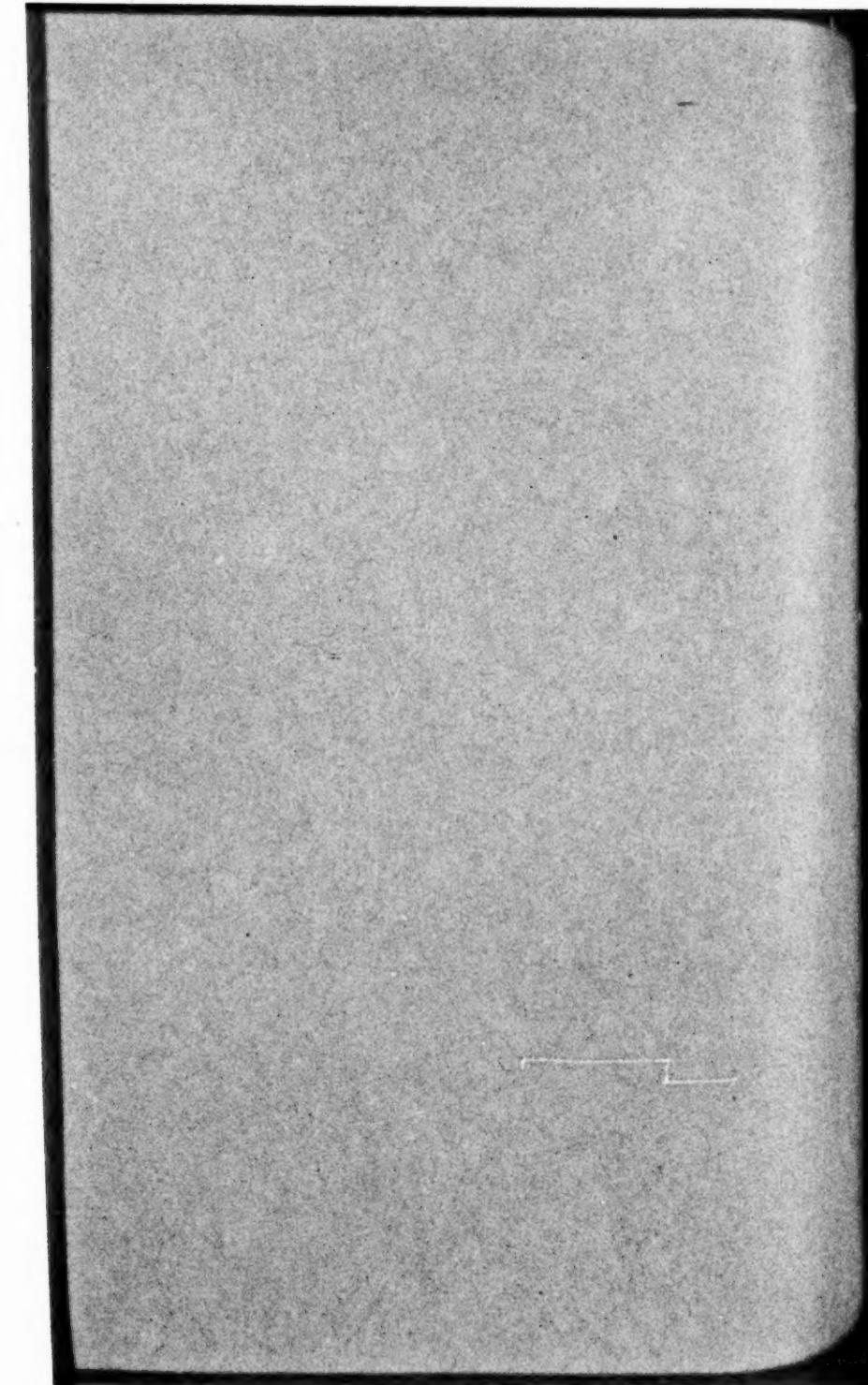
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**In Error to the United States Circuit Court of Appeals for  
the Fourth District.**

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**REPLY BRIEF ON BEHALF OF SARAH E. HOLBROOK,  
ADMINISTRATRIX.**





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**REPLY BRIEF ON BEHALF OF SARAH E. HOLBROOK,  
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**QUESTIONS STATED.**

Defendant in error filed her "Motion to Affirm" and brief in support thereof, and plaintiff in error filed its "Answer and Brief" resisting the motion; thereupon the court, upon the motion of the parties placed this case on the Summary

Docket and assigned it for argument on November 30, 1914. Since then plaintiff in error has filed an additional and more extensive brief, and defendant in error now comes and files, by her counsel, her reply brief.

There are three questions which arise upon this motion and writ of error. **First**, does the review of the question raised on the writ of error involve an interpretation of the Federal Employer's Liability Act of 1908? **Second**, is the instruction involved, so plainly erroneous as to have necessarily prejudiced plaintiff in error and require a reversal? **Third**, are the contentions of plaintiff in error for an affirmative answer to each of these questions, so clearly without color of merit as to be open to the charge of being "frivolous"? We shall discuss these questions in the order set out.

#### ARGUMENT.

1. THE INTERPRETATION OF THE FEDERAL EMPLOYER'S LIABILITY ACT IS NOT INVOLVED.  
**The Identical Question Here Raised Could be raised with Equal Propriety in any action brought Under any one of the many Statutes modeled after Lord Campbell's Act, and there is nothing in the Federal Statute distinguishing the measure of damages there fixed from that fixed by the "general law" in any action for personal injury or wrongful death.**

In the original brief filed for defendant in error it was not anticipated that it could be contended that the interpretation of this statute was in anywise involved, and it was stated (p. 21) as a matter not open to argument, that the question here did "not involve the interpretation of this particular statute in any way which would distinguish it from any one of the statutes in this country modeled after Lord Campbell's act."

Upon the filing of opposing "Answer and Brief" in October it was ascertained that the only ground relied on for asking

a review of the case in this court, (pp. 2-3), was because it was said that the question "requires a construction of the legal meaning and effect of a federal statute" and the "interpretation of the Federal Employer's Liability Act"; and it was conceded, (p. 6) that "In a matter of the general law of negligence not requiring an interpretation of a federal statute this court would not review the Circuit Court of Appeals." And in the additional opposing brief filed in November, (p. 6), opposing counsel again say that the instruction complained of involved an "attempt to interpret the Federal Employer's Liability Act in respect of an important feature; the pecuniary damages which the statutory beneficiaries might recover." So that, in deference to the views expressed by our friends on the other side, and especially in view of the concession that unless the "interpretation" of this statute is involved this court will "not review the Circuit Court of Appeals", we have re-examined our original conclusion in the light of what is said by opposing counsel.

This re-examination of the question has confirmed the opinion stated in original brief, and is based on the following reasoning:

**The Correctness of Instruction Involved Cannot Be Determined by Inspection of Any Provision of the Statute.**

This court stated in the **Vreeland Case**, 227 U. S. 59, that "The distinguishing features of (Lord Campbell's) act are identical with the act of Congress of 1908 before its amendment." Both acts are there set out in the margin. In the former act it is provided that the wrong-doer "shall be liable to an action for damages", which shall be "proportioned to the injury resulting from such death". By the act of Congress it is provided in section 1 and 2 that the wrong-doer "shall be liable in damages . . . for such injury or death". After stating that the word "pecuniary" was in neither act Mr. Justice Lurton said. "But

the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage." It, therefore, may be said that we do arrive at the **standard** of recovery by an "interpretation" common to all such statutes; but, even as to the standard, the conclusion is not reached from any language contained in the statute. That there is a clear distinction between the generic standard of loss and the specific elements embraced by that standard, we think is manifest; the legal standard of care as between master and servant is always the same whether the servant be an experienced adult or an inexperienced minor, but the degree of care required by that standard always varies with the circumstances.

Now, there has never been and is not at this moment the slightest controversy as to the standard of recovery applicable in this case, nor is it now contended that the trial court was asked or intended to apply any other than the "pecuniary" standard; the contention is merely that the trial court erred in its attempt to apply the true standard. Confessedly, it would have committed the identical alleged error had it been trying the case under the West Virginia statute for wrongful death and its jurisdiction had been invoked upon the ground of diversity of citizenship, in which case the affirmance in the Circuit Court of Appeals would have been final. It would seem to be manifest, therefore, that there is no provision in the federal or any similar statute which can be looked to in the way of "interpretation", for light upon the question raised; but that we can look alone to the "general law" or commonlaw as it was settled long before the statute in question was ever enacted. A reference to the authorities cited in the **Vreeland Case**, is all that is necessary to establish this fact, and had opposing counsel been able to cite any authorities tending to show error in the instruction, they likewise must necessarily have been gathered from the general commonlaw on this subject.



We think the distinction between the generic standard of recovery and the elements embraced by that standard are obvious; and that the enumeration of the latter does not involve an "interpretation" of the statute, is shown by the decisions of this court. Sections 1 and 2 of the act both predicate liability upon "negligence". There is nothing in the statute indicating the standard of care the breach of which will constitute "negligence" except the relation of master and servant upon which the act is based; and no resort to "interpretation" of the statute would enable this court to determine the standard fixed by that mere relation; therefore, what is "negligence", must be determined in every case by resort to the commonlaw of master and servant, just precisely as we must resort to the same "general law" to ascertain what "damages" are meant. And this court has repeatedly decided in a series of cases based on the Safety Appliance Acts and the Federal Employer's Liability Act, recently before it, that the alleged erroneous application of the commonlaw rules of negligence presented no "question concerning the interpretation" of either statute, but "merely involve considerations of general law depending in no sense upon the particular significance" of any provision in the statutes, (*So. R. Co. vs. Gadd*, 233 U. S. 572, and cases cited).

On the other hand, the case of *Seaboard A. L. R. Co. vs. Horton*, 233 U. S. 492, necessarily involved an "interpretation" of the act in question, and this is self-evident from the fact that the liability of the carrier in that case depended solely upon how far the commonlaw doctrine of assumed risks was modified by the provisions of the federal statute.

Another view which, as it seems to us, precludes the idea that the objections to the instruction at bar involves the "interpretation" of the statute, is this: Suppose this action had been instituted in the state instead of the federal court, and the identical instruction had been given and approved by the state court of last resort; and then plaintiff in error

had invoked the jurisdiction of this court under Rev. Stat. Sec. 709, U. S. Comp. Stat. 1901, p. 575; Jud. Code, Sec. 237, and thereupon defendant in error had moved to dismiss because no "federal question" was involved? Would not this court have sustained the motion without regard and without inquiring as to whether or not the instruction was erroneous? We think so, upon the authority of **Seaboard A. L. Ry. Co. vs. Duvall**, 225 U. S. 477, and **St. Louis, Etc. R. Co. vs. Taylor**, 210 U. S. 281-293. In the Duvall case the action was based on the Federal Employer's Liability Act and the facts proved put it within its provisions; the railway relied on contributory negligence and asked four special charges on this subject which were refused, and objected to one given by the court on the same subject, and then asked this court to review the action of the state court on this subject. It was held by this court that the exceptions taken "did not raise any specific question as to the proper construction of the act under which this action has been brought" and that there was no "Federal question which this court may review", and the writ of error was dismissed. On the other hand the Taylor case, like the Horton case, was a typical case of Statutory Construction, and like the Horton case the decision turned on the construction of the face of the statute;—in that case it was the Federal Safety Appliance Act. There, the state court's erroneous construction of the statute imposed liability on the railway, whereas a correct construction gave it immunity, and this court held that such an erroneous construction of a federal statute did present a Federal Question. We think, therefore, that had the case at bar come to this court from a state instead of federal court, upon the identical assignment of error now presented, it must have been dismissed because it did not involve the "interpretation" or "construction" of the act in question, but merely assailed the alleged academic inaccuracy and unhappy phraseology which is said to have made the instruction as to the elements of "pecuniary" damages, "obscure and misleading"; which, under all the

authorities is a commonlaw question, and under the Duvall case is not a "Federal Question". For these reasons we submit that the question presented for review in this case does not involve the "interpretation" or "construction" of a federal statute, but on the contrary is one common to every action for injury or death arising between master and servant; and that, though this court may have jurisdiction, merely because the defendant in error sued under a federal statute, yet "the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the judiciary act of 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), to submit to the final jurisdiction of the Circuit Court of Appeals", **Chicago, Etc. vs. King**, 222 U. S. 222; and it is difficult to see why the statute in this case should broaden the scope of review in this court, since it can have no more bearing upon the point in question than did the plaintiff in error's "charter from the United States" in **Texas, Etc. R. Co. vs. Howell**, 224 U. S. 577.

On pages 3 and 4 of their brief of October 12th opposing counsel remark that this court has not treated such questions as are here presented as "frivolous" but has "uniformly" confined recovery under this statute to the "pecuniary damage" and that reversals have followed any departure from this standard by lower courts,—citing the **Vreeland**, **Didricksen**, and **McGinnis** cases as instances. In reply to this we say that no case has come under our observation in which this court has reversed the Circuit Court of Appeals upon the sole question of the measure of damages under this or any other statute; certainly, such was not the fact in either of the cases cited. The **Vreeland** case came here direct from the trial court upon a constitutional question, and being here on that question it was reversed for the obvious error of allowing a recovery by a widow, (not a minor child), for loss of "care and advice" "in addition" to the pecuniary loss of support and maintenance, when "there was neither allegation nor evidence of such loss of service,

care, or advice". The Didricksen case came direct from the U. S. District Court for the territory of Porto Rica, and involved the questions of the application of the Safety Appliance Act and Federal Employer's Liability Act of 1908 to that territory; and the trial court having allowed parents to recover for the loss of "society and any care and consideration" their deceased son might have given them, although there was no "allegation of any such loss, nor any evidence relating to the subject", the case was reversed for that reason. The McGinnis case came to this court from a state court of last resort and of course had to have a "Federal Question" in order to be reviewed here; and this question involved the inquiry as to who were and who were not beneficiaries under the federal statute; that is, whether a married daughter living with and maintained by her husband and having no pecuniary claim whatever upon her father, could recover for the latter's death under the Federal Employer's Liability Act. Manifestly, this involved an interpretation and construction of the statute as much as the question as to what work would be employment in interstate commerce on the part of the employee. There may be cases where this court has reviewed and reversed the Circuit Court of Appeals on the measure of damage, but opposing counsel do not cite and we do not know of such a case. Bearing in mind the "purpose of the judiciary act of 1891" to distribute the appellate jurisdiction in the federal courts, as declared by this court in the King case and Gadd case, we venture to suggest with great diffidence that this "purpose" would seem to clearly imply the same limitations upon the **scope of review** where cases are brought here from the circuit court of appeals, as are established with regard to the **jurisdiction** of this court when cases are brought here from a state court of last resort; and as to this latter class of cases it is perfectly well settled, as declared by Mr. Justice Moody in the Taylor case: "But we have not the power to correct mere errors in the trials in the state courts, although affirmed by the highest state courts. This court

is not a general court of appeals, with the general right to review the decisions of state courts". Unless the "purpose" of the judiciary act does carry with it the limitation suggested the result would seem to be that actions brought in the state courts under the act in question, must involve a "Federal Question" in order to be heard here at all; while, on the other hand, if brought in the federal courts they may be heard here on a second writ of error to the circuit court of appeals as a matter of right and without any such limitation. We submit, therefore, that the scope of review in this case ought not to be extended to embrace "mere errors" said to consist of an "obscure and misleading" paragraph of the instruction on the commonlaw question of the measure of damages, when the statutory question of liability was established in the trial court, unanimously affirmed in the Circuit Court of Appeals, is not denied or questioned in this court, and when the single assignment of error is of such a character as not to be open to review here upon a writ of error to a state court, as shown by the decision in the Duvall case.

**2. Was There Such "Plain Error" in Overruling Objection Made as to Have Prejudiced Defendant and Require Reversal?**

The objection made at the time and passed on by the trial court is stated on page 292 of record and is: (1) That the instruction embraced improper "elements" of damage; and (2) that it "tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the case of persons suing who were more distantly related" (to decedent). The first objection as to improper "elements" will not be discussed as it was originally intended to apply to the father's "care", etc., referred to in paragraph "(2)" of the instruction, and has not only been waived but the instruction is now admitted to be "correct" in that particular, and the only part of the instruction now

claimed to be objectionable is the paragraph quoted in the opinion of the Circuit Court of Appeals, and quoted on page 6 of opposing brief, to which alone the second objection is directed. In reply to our learned adversaries as to this objection we respectfully submit:

- (a) **The objection addressed to and passed on by the trial court cannot be enlarged so as to cover any one of those now urged in brief.**

It is, as we think, very clear, that in order to sustain the objection originally made, opposing counsel would have to establish three propositions: **First**, That the instruction did "tell the jury" in words or substance and effect, or necessarily implied, just what was stated in the objection. **Second**, That said statement to the jury was not true as matter of law under any state of facts; or, **Third**, That it was not true as matter of law under the facts proved in this case. After giving opposing briefs as careful analysis as we could, we find that the objections now urged, are as follows: **First**, That the instruction directed the jury to make two "comparisons"; (a) between decedent's minor children and "hypothetical adult beneficiaries"; and, (b) between decedent's minor children and "hypothetical" "next of kin"; and then, having ascertained the damages such "hypothetical" beneficiaries would be entitled to, (without the aid of any evidence on this subject), they were to ascertain the damage in this case by fixing it at a "much greater" sum, disregarding the voluminous evidence actually introduced tending to show the damage actually suffered by these beneficiaries, in so far as it conflicted with the result of said "comparisons". (That the court did not "tell the jury" this or any thing from which this could be implied by a man in his right mind is shown by the whole instruction and needs no argument; and the original objection shows that "adults" were not referred to at the time). **Second**. It is now objected that the instruction made the "relation itself", inde-

pendent of the BENEFICIAL value of the life, a "factor" in fixing the amount of the damage. (That the instruction did not "tell the jury" this in terms is proved by an inspection of the instruction; that it was not capable of such a construction is expressly negatived time and again in the instruction; that it was not so understood by opposing counsel at the time, is expressly shown by the objection they made which does not suggest such a construction or objection on their part, and also proved by the fact that they asked no instruction, which the court would certainly have given, telling the jury that the naked "relation", without regard to its BENEFICIAL CHARACTER, was not a "factor" to be considered; and lastly, the instruction as a whole necessarily implied to any intelligent jury, (as well as all the evidence in the case), that the court **did not** mean that the "relation itself" was a "factor", but that it necessarily meant the BENEFICIAL "relation" as shown by the evidence before the jury; and the fact that the instruction was and is now so understood by opposing counsel is proved by their own brief on page 7, where their statement "(b) that the relation itself" was made a "factor", is flatly contradicted by their preceding statement marked "(a)" that the instruction meant that the recovery for the **infants** in the case at bar should be "much greater" than if they were "adult"; which manifestly would not be true if the "relation itself" was made the "factor", since the mere blood "relation" would have been the same without regard to the age of the children, and infants would not have been entitled to "much greater" damage than an "adult", under the construction now contended for by opposing counsel).

**Third**, it is now objected that the instruction was erroneous for "over-emphasizing the relation itself" independent of its beneficial value. (What has been said as to the second objection applies to this also, and an inspection of the objection stated in the record is all that is necessary to show that the present objection was not suggested to the court). **Fourth**, it is now further objected that the instruction was



"obscure and misleading". (The objection made at the time it was given does not suggest it. Had academic inaccuracy, unhappy phrasing, or over-emphasis of any one fact, calculated to obscure or mislead, been suggested by an objection made at the time, the court could and would have cured it, and there would have been no occasion for such an objection at this late day). **Fifth**, and lastly opposing counsel now object in the last words of their brief that the instruction was "not founded upon any evidence in the case." (This assumes that the legal "principles" given the jury were sound in law but inapplicable under the facts proved. Manifestly, no such ground is hinted at in the objection saved, nor is this belated objection supported by any reasoned argument so far as we are able to discover; but is a naked assertion in the face of the findings of both lower courts as quoted from the opinions on page 12 of original brief for defendant in error). Therefore, it is submitted with deference, that neither of the five objections now urged in opposing brief to the instruction in question, is based on or tends to establish the objection passed on by the trial court and reserved at the time, and that the latter cannot be enlarged so as to cover any objection not specifically and clearly made at the time, and that the present objections are for this reason not open to argument in this court. If we are right in stating the scope of the original objection our conclusion that the five belated objections are not now open, is too well settled to require authority.

**(b) Was the Objection Actually Made, Well Taken?**

Counsel in their objection alleged that the paragraph in question, "tells the jury that (plaintiff is) entitled (under the evidence) to larger damages" than persons "more distantly related" to decedent would be. In reply we submit:

**First: The Instruction Told the Jury Nothing of the Sort:**  
 "The first and second sentences of the instruction limited the jury to "pecuniary" damages. The first told them what



was not "permissible" as a basis of recovery, and under this sentence, (standing alone), in connection with the generally accepted definition of the word "pecuniary" by laymen, it would have been probable, if not inevitable, that the jury would have confined the loss to the mere wages of decedent; therefore, because "the word as judicially adopted is not so narrow" (Vreeland case), as the jury would have inferred from the first sentence, the court gave the second sentence to enlighten and prevent misapprehension by the jury, and gave it in almost the identical words of this court in the Mackey case, (157 U. S. 72). The sentence objected to begins with the word "However," and shows, as we think, that the object of the court was merely to negative a too "narrow" construction of the first sentence, and to state general "principles" which confessedly apply to the facts. To show conclusively that the jury could not have understood the general "principles" stated in the two first sentences, to authorize them to assess the damages in this case by resorting to the two "comparisons" suggested instead of to the evidence before them; we have only to look to the third sentence, which "tells the jury" explicitly that in applying these "principles" they are to fix the "pecuniary loss as **hereinafter explained**". Then follows paragraphs "(1)" and "(2)" which are specific directions as to all the "elements" of "pecuniary" loss and "tells the jury" that they are to fix the amount under both paragraphs "as shown by the evidence" and not alleged "comparisons".

**Second. Had the Court Told the Jury that these Beneficiaries were entitled to "Larger Damages" than persons "More Distantly Related", it would not have been error under the Undisputed Facts.**

(Before discussing this, it may be noted that there is not a contention, an argument, an authority, or a fact, which appears to be set up in opposing brief for the purpose of showing that the plaintiff in this case was NOT "entitled to larger damages", as matter of law, than per-

sons "more distantly related" would have been. Opposing counsel have much to say in support of the five objections urged in this court, but not a word in support of the one made and passed on by the trial court, and the inference is that they themselves realize that the original objection could not be sustained, and therefore they sought to enlarge it. What they say on pp. 12-13 as to the alleged large amount of the verdict merely tends to show a difference of opinion between the jury and the Railway Company, and the trial court and the railway, upon a pure question of fact). In addition to this apparent concession on the part of opposing counsel, we further submit that the statute on its face and the judicial construction of similar acts, both show that the beneficiaries in question were "entitled to larger damages", as matter of law, than more distant relatives.

**THE STATUTE.** Manifestly, in giving preference among the beneficiaries selected, Congress had regard to the extent of their injury, the character of their rights, and the relation severed by the death, and then gave the preference to the **greatest sufferers** in the order named;—namely, "the surviving widow . . . and children"; and, if "none", then "parents"; and, if none, then "dependent" "next of kin". It is clear that "next of kin" necessarily means persons "more distantly related" to decedent than any one of the previously preferred relatives, and hence can only include collateral "next of kin", (the only other possibly embraced being a grand-child or grand-parent). It is also manifest that the "widow" and "children" are preferred to the exclusion of "next of kin" even though the former be adults and the latter infants and "dependent". Looking to the statute alone, therefore, it would seem not to have been error to have instructed as the court is said to have done.

**JUDICIAL CONSTRUCTION.** It is Clearly Established That Substantial Pecuniary Damage is Presumed as a Mat-

ter of Law in favor of a Widow and Children; the presumption is *prima facie*, of course, and it may be shown that the deceased husband and father was a burden, but in the absence of such rebutting evidence the presumption prevails. This presumption is recognized and applied in the following cases:

- B. & P. R. Co. v. Mackey, 157 U. S. 72.  
 2 Sedgwick on Dam., 9th Ed., Sec. 584a.  
 Atchison, etc. R. Co. v. Wilson, (C. C. A.), 48 Fed. 57, 61.  
 Spiro v. Felton, (U. S. C. C.), 73 Fed. 91.  
 Felton v. Spiro, (C. C. A.), 78 Fed. 576-7.  
 Peden v. Am. Bridge Co., (U. S. C. C.), 120 Fed. 523, 524.  
 Fithian v. R. Co., (U. S. C. C.), 188 Fed. 842, 845.  
 Chicago, etc. v. Woolridge, (Ill.), 51 N. E. 701, 702.  
 Dukeman v. Cleveland R. Co., (Ill.), 86 N. E. 712, 714.  
 L. & N. R. Co. v. Buck, (Ind.), 19 N. E. 453-4.  
 Korrady v. R. Co., (Ind.), 29 N. E. 7069.  
 Haug v. Gr. N. R. Co., (N. D.), 77 N. W. 97.  
 Hays v. Hogan, (Mo. App. 1914), 165 S. W. 1125.

In Felton vs. Spiro, (decided by Circuit Judges Taft and Lurton, and District Judge Sage), the Mackey case, 157 U. S. 72, is cited and followed. In Fithian vs. R. Co., District Judge Trieber, cites and follows the Mackey case, and says at page 845:

"What the measure of damages should be depends to a great extent upon the relationship of the survivors to the deceased and the pecuniary loss sustained by them by reason of his death. The widow and children are naturally dependent upon him to a greater extent than any other relative and entitled to support from the husband and parent. For this reason they would no doubt be entitled to

a larger compensation than any other relatives.  
 Baltimore & Potomac R. Co. vs. Mackey, 157 U.  
 S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624."

In the case of mere "**next to kin**" the contrary presumption prevails:

2 Sedgwick on Dam., 9th Ed., Sec. 584a.

Burk v. Arcata R. Co., (Cal.), 57 Pac. 1065.

Rhoades v. Chicago, etc., (Ill.), 81 N. E. 371, 374.

Garrett v. L. & N. R. Co., (C. C. A., 6th Cir.), 197  
 Fed. 715, 722.

In Re Cal. Nav. & Impt. Co., (U. S. D. Ct.), 110 Fed.  
 670, 677.

Case Note, 11 L. R. A. (N. S.) 623.

The last case cited is a particularly apt illustration of the question. In that case there had been an explosion on a ship causing four deaths and there was an action for damages in each case, and the proof was practically identical in each case, and showed (a) the age and expectancy of life and earnings of each decedent; and (b) the number, age, and relation of each surviving beneficiary. In three of the cases the beneficiaries were widows and minor children, and in the other, brothers and sisters, ("next to kin"). In the three former cases all recovered substantial damages, and the brothers and sisters got nothing.

(c) With all deference we submit that opposing counsel's criticisms of the amount of the verdict on pages 12-13 of their brief, are out of place. If their objection to the instruction was well taken it would be none the less so had the verdict been smaller, and if the instruction was correct as matter of law, when given, it did not cease to be so upon the return of the verdict, even had that been for \$40,000. the amount sued for; and hence, what is said on this subject is but an attempt, as it seems to us, to establish error

on the part of the trial court by asking this court to review the finding of the jury on a pure question of fact. That counsel are familiar with the rule which forbids this court reviewing the findings of the jury on questions of fact, is shown by their citation of **So. R. Co. vs. Bennett**, 233 U. S. 80, the latest of a series of cases in which this court has held that it had no power to supervise the action of a jury in assessing damages; and therefore they say they merely want to show the "effect of an erroneous charge" by pointing out the alleged excessiveness of the damages. Doubtless, opposing counsel overlooked the familiar principle that the effect of such a charge is presumed to have been prejudicial, (unless it clearly appears to have been harmless), and that one complaining of it does not have to point out its "effect". They must also have overlooked the fact that after the trial court refused to disturb or reduce the amount of the verdict, the fact that it was not excessive under the evidence is established as a **matter of law**, and hence the amount of the verdict cannot properly be said by counsel in this court, to show the "effect of an erroneous charge". In this connection we deem it proper to call the court's attention to the following statement on page 12 of opposing brief: "The trial Judge used \$700.00 as the annual figure which deceased '*could*' have expended on his family, or have invested for their ultimate benefit.' (Record, page 297)." (The word "*could*" was italicised by opposing counsel, and not by the trial Judge). This was intended to be a statement to this court that the "trial Judge" found that "\$700.00" was the **maximum** which the evidence warranted the jury in finding "*could*" have been so expended, and not the **minimum**. The quotation from the trial Judge's opinion at the page cited, is an erroneous quotation and the implied statement that the trial Judge "used \$700.00" as a maximum under the evidence instead of a minimum, is wholly erroneous and just the reverse of the facts as appears from the opinion itself. That the trial Judge "used \$700.00" as a **minimum** which the jury could have found and not the

maximum is expressly stated by the trial Judge on page 300 of record as follows:

**"If they (the jury) estimated his (decedent's) probable future earnings at \$1,000 or even \$1,200 per annum, it cannot be said that they were unjustified by the evidence."**

In further response to the opposing contention that the amount of this verdict is to be considered as the "effect of an erroneous charge", we point to the Bennett case, cited by opposing counsel in this connection, on page 13 of their brief. In that case the charge on the measure of damages was admitted to be correct; the earnings of Bennett which were devoted to his family, were identical with the minimum in this case as found by the trial Judge,—"\$700.00"; the expectancy of future life were the same within a fraction of a year, (Holbrook's being 29.62 years, record, p. 195, and Bennett's being 30); Holbrook left a widow and five boys and girls whose ages were from 1 to 14; Bennett left a widow and only three children who were all boys whose ages were 10, 13, and 15, as appears from the record in that case in the testimony of Mrs. Bennett; (a very material difference, as held by Judge Taft in *Felton vs. Spiro*, 78 Fed. 576-7, under the authority of this court in the Mackey case). Another material difference in the facts of the two cases, under the authority of this court in the Vreeland case, is that it did not appear in the Bennett case, that he was "devoted to his family and assiduous in the discharge of his domestic obligations", as was found from the "undisputed" evidence in this case by the Circuit Court of Appeals. Yet, in spite of these differences in favor of the case at bar, the jury in the Bennett case, under admittedly correct instructions, returned a verdict for the precise amount as was done here.

Opposing counsel, we think, have permitted their point of view to obscure the fact, that heretofore verdicts in such

cases have been every where limited in amount by state statutes, which limits have been accepted by some courts as evidence of the maximum amount which ought ever to be allowed in any such case. *Cheatham vs. Red R. L.* (U. S. D. C.), 56 Fed. 248; *Farmer's L. & Tr. Co. vs. Toledo, etc.*, (U. S. C. C.), 67 Fed. 73, 78). The fact cannot be ignored that when Congress refused to limit the amount recoverable in such actions, it was the expression of its disapproval of the policy evidenced in such state statutes, and express evidence of the Congressional purpose and intent to leave the limit of recovery to the juries of the country subject to the supervision of the trial courts. This was the view of the learned Judge of the trial court as stated in his opinion, record, page 300.

Respectfully submitted,

WILLIAM H. WERTH,

Attorney For Sarah E. Holbrook, Administratrix, Etc.

November, 1914.

NORFOLK & WESTERN RAILWAY COMPANY v.  
HOLBROOK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE  
FOURTH CIRCUIT.

No. 516. Argued December 1, 2, 1914.—Decided January 5, 1915.

Under the Employers' Liability Act, where death is instantaneous the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same. In every instance, however, the award must be based on money values, the amount of which can be ascertained only upon a view of the peculiar facts presented.

While it is proper for the trial court to instruct the jury to take into consideration the care, attention, instruction, guidance and advice which a father may give his children and to include the pecuniary value thereof in the damages assessed, it is not proper to give the jury occasion for indefinite speculation by comparing the rights of the actual beneficiaries with those of the supposed dependents who are mere next of kin.

Where the facts are adequate to constitute a strong appeal to the sympathy of the jury the charge should be free from anything which the jury can construe into a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice or any other violation of lawful rights. *Pleasants v. Fant*, 22 Wall. 116. 215 Fed. Rep. 687, reversed.

THE facts, which involve the construction of the Federal Employers' Liability Act of 1908, are stated in the opinion.



*Mr. F. Markoe Rivinus*, with whom *Mr. Theodore W. Reath* was on the brief, for plaintiff in error.

*Mr. William H. Werth* for defendant in error:

Substantial pecuniary damage is presumed as a matter of law in favor of a widow and children; the presumption is *prima facie*, of course, and it may be shown that the deceased husband and father was a burden, but in the absence of such rebutting evidence the presumption prevails. This presumption is recognized and applied in the following cases: *Balt. & Pot. R. R. v. Mackey*, 157 U. S. 72; 2 Sedgwick on Dam., 9th ed., § 584a; *Atchison &c. Ry. v. Wilson*, 48 Fed. Rep. 57; *Spiro v. Felton*, 73 Fed. Rep. 91; S. C., 78 Fed. Rep. 576; *Peden v. Am. Bridge Co.*, 120 Fed. Rep. 523; *Fithian v. Railroad Co.*, 188 Fed. Rep. 842; *Chicago &c. R. R. v. Woolridge*, 51 N. E. Rep. 701; *Dukeman v. Cleveland R. R.*, 86 N. E. Rep. 712; *Louis. & Nash. R. R. v. Buck*, 19 N. E. Rep. 453; *Korrady v. Railroad Co.*, 29 N. E. Rep. 1069; *Haug v. Gr. Nor. R. R.*, 77 N. W. Rep. 97; *Hays v. Hogan*, 165 S. W. Rep. 1125.

In the case of mere next of kin the contrary presumption prevails. 2 Sedgwick on Dam., 9th ed., § 584a; *Burk v. Arcata R. R.*, 57 Pac. Rep. 1065; *Rhoades v. Chicago &c. R. R.*, 81 N. E. Rep. 371; *Garrett v. Louis. & Nash. R. R.*, 197 Fed. Rep. 715, 722; *In re Cal. Nav. Co.*, 110 Fed. Rep. 670, 677, and see Case Note, 11 L. R. A. (N. S.) 623.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

W. T. Holbrook, a bridge carpenter, aged thirty-eight and employed by plaintiff in error at a wage of \$2.75 per day, was killed by a passing train while at his work in McDowell County, West Virginia, January 4, 1913. He left a widow, thirty-two years old, and five children of

one, four, seven, eleven, and fourteen years. The widow qualified as administratrix and instituted this suit under the Employers' Liability Act, approved April 22, 1908, c. 149, 35 Stat. 65, in behalf of herself and children in the United States District Court, Western District of Virginia. She charged that the accident resulted from negligence of agents and employes of the Railway Company and at the trial introduced evidence tending to establish this fact. The jury returned a verdict for \$25,000 in her favor; judgment thereon was affirmed by the Circuit Court of Appeals (215 Fed. Rep. 687); and the cause was brought here.

The only assignment of error now relied upon goes to a single sentence in instruction No. 5, wherein comparison is made between the pecuniary injuries of a widow and infant children and those of adults or mere next of kin. At the instance of the administratrix, the court told the jury (instruction No. 4) that if Holbrook's own negligence contributed proximately to his death only proportionate damages could be recovered and then gave instruction No. 5, in the following words:

"The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.

"However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary

injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding \$40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

“(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed; and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life, as shown by the evidence introduced before you.

“(2) The jury will also take into consideration the care, attention, instruction, training, advice and guidance which one of decedent's disposition, character, habits, intelligence, and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed.”

The Railway Company duly excepted because “the court tells the jury that the widow and infant children of decedent are entitled to larger damages than would be the

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case of persons suing who were more distantly related." The exception was overruled, and this action is now relied on as material error requiring a reversal.

Under the Employers' Liability Act, where death is instantaneous, the beneficiaries can recover their pecuniary loss and nothing more; but the relationship between them and the deceased is a proper circumstance for consideration in computing the same. The elements which make up the total damage resulting to a minor child from a parent's death may be materially different from those demanding examination where the beneficiary is a spouse or collateral dependent relative; but in every instance the award must be based upon money values, the amount of which can be ascertained only upon a view of the peculiar facts presented. *Michigan Central Railroad v. Vreeland*, 227 U. S. 59, 68, 72, 73; *American Railroad of Porto Rico v. Didricksen*, 227 U. S. 145, 149; *Gulf, Colorado &c. Ry. v. McGinnis*, 228 U. S. 173, 175, 176; *North Carolina Railroad v. Zachary*, 232 U. S. 248, 256, 257.

In the present case there was testimony concerning the personal qualities of the deceased and the interest which he took in his family. It was proper, therefore, to charge that the jury might take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed he reasonably might have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed. But there was nothing—indeed there could be nothing—to show the hypothetical injury which might have befallen some unidentified adult beneficiary or dependent next of kin. The ascertained circumstances must govern in every case. There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased

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husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts. *Insurance Co. v. Baring*, 20 Wall. 159, 161.

The facts brought out during the course of the trial were adequate to constitute a strong appeal to the sympathy naturally engendered in the minds of jurors by the misfortunes of a widow and her dependent children. In such circumstances it was especially important that the charge should be free from anything which they might construe as a permission to go outside of the evidence. It is the duty of the court in its relation to the jury to protect the parties from unjust verdicts arising from impulse, passion or prejudice, or from any other violation of lawful rights. *Pleasants v. Fant*, 22 Wall. 116, 121.

Considering the whole record we feel obliged to conclude that the probable result of the indicated language in Instruction No. 5 was materially to prejudice the rights of the Railway Company. The judgment of the Circuit Court of Appeals is accordingly reversed and the cause remanded to the District Court for the Western District of Virginia for further proceedings in conformity with this opinion.

*Judgment reversed.*

MR. JUSTICE McKENNA, with whom MR. JUSTICE DAY and MR. JUSTICE HUGHES concur, dissenting.

I am unable to concur in the opinion and judgment of the court. I think the criticism that the railway company makes of the charge of the court to the jury is too severe in inference and makes a single sentence in a charge which

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occupies a page of the record exclusively dominant, pushing aside all qualifications and particulars. I do not think this is permissible. The charge of a court to a jury must be considered as a whole, not by isolated sentences, and a jury as one of the tribunals of the country must be presumed to have some sense.

The court in the case at bar was confronted with the difficulty with which courts are often confronted and which no court has yet been able completely to surmount by any form of words—of bringing home to itself or to a jury the loss to wife and infant children through the death of the husband and father. The court in the present case ventured to say that these relations had something more in them and their destruction had something more of “pecuniary injury” than the injury to “the mere next of kin” and that there might be a loss to infant children greater than to adults. Would any one like to deny it? Would not its denial upset all that is best, in sentiment and duty, in life? And must that sentiment and duty, so potent in motive and conduct, be illegal to emphasize in a court of justice as an interference with the strict standards of the law?

By these standards, I admit, the charge of the court must be determined, and, therefore, let us turn to them as applied by the district court. The court said the amount of recovery must “be measured by the pecuniary injury suffered by the widow and infant children as the *direct result* of the death of the husband and father, it not being *permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other purely sentimental injury or loss.*” (Italics mine.) Can there be any mistake in the standard declared by the court? Not love, not sorrow, not mental anguish, not sentiment, but loss in money “as the direct result of the

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death," and beyond that money loss "it not being permissible for the jury to go." The standard then is money loss, or, to use the court's words, "the pecuniary injury suffered." No prompting to or excuse for impulse or passion was given, nor was imagination left any sway. The judgment of the jury was brought and held to the money value of the life destroyed to wife and children dependent upon it. And the elements in the computation were not left undefined. They were enumerated as follows: (1) Earning capacity at time of death and the probability of its continuance. In estimating the latter, and hence the value of it to wife and children, the jury were told to consider the age, health, habits, industry, intelligence and character of the deceased and his expectancy of life, as shown by the evidence—all, I may say in passing, strictly legal elements and none found fault with. (2) Regarding those qualities and his devotion to his parental duties or indifference thereto, as shown by the evidence, the jury were instructed to take into consideration "the care, attention, instruction, training, advice and guidance" which "he would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

A money standard with careful iteration, it will be observed, is declared throughout, and there is no dispute as to the elements to which it is to be applied; and of which the law assigns to the jury the duty of estimating. I repeat, no error is asserted of these elements or of the estimate of their pecuniary value by the jury, but counsel say that they were made vicious and might have been exaggerated or misunderstood by the comparison made by the court between the widow and children and dependents who were mere next of kin and between infants and adults. It may be well to give the court's language.

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After stating that the amount recovered should be measured by the pecuniary injury suffered, the court added, "However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages." It is objected that the instruction was error because the court told the jury that the widow and children of the deceased were entitled to "larger damages" than would have been allowable to persons suing who were more distantly related. The first impulse of the mind is against the objection, and the impulse is supported by the deliberate resolution of cases. In *Ball. & Pot. R. R. v. Mackey*, 157 U. S. 72, and *Michigan Central R. R. v. Vreeland*, 227 U. S. 59, the same distinctions are expressed. In explanation of those cases counsel say this court announced "the general proposition of law that the rule for damages must differ as the degree of the *proven* dependence of the beneficiary differs," and add, "but matter suitable in an opinion of an *appellate* court may be inappropriate in a charge to a jury." The latter statement is rather intangible. It cannot be that the law declared by an appellate court is unsuitable to be followed by a trial court. The court besides in the pending case did no more than express the elements of damages as dependent upon the relationship of the deceased to the beneficiaries. The distinction is a natural one, based on the realities of life, and I cannot conceive of a mistake by the jury in its application. There may be, indeed, special cases, and counsel imagines there may be, of crippled or diseased adults or infirm next of kin who, on account of their condition, may be entitled to a special considera-



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tion, but the possibility of their existence did not make the instruction of the court erroneous, or that the jury in some way might have made a "comparison between beneficiaries who were before the court and hypothetical beneficiaries who were not in the case at all." In other words, the contention is that the jury was left or invited to conjecture the injury in an extreme example of imaginary dependent next of kin as necessarily below the limit of the injury to the widow or infant children, and this notwithstanding the careful enumeration of the elements of damage contained in the charge of the court. I am unable to yield to the contention. The court only expressed a general distinction, a natural one based on general experience and supported by a difference in legal obligations. It is a distinction recognized by the statute by virtue of which the action was brought as determining the order of precedence of its beneficiaries. The law, therefore, recognizes the fact, and it is not to be put out of view, that there is a difference in the relation of a widow and children to a deceased husband and father and the relation of the next of kin, whatever be the degree of the dependence of the latter. But, granting I am mistaken in this and that there may be exceptional cases of dependent next of kin, they do not constitute the rule, and the objection to the charge of the court was too general. The objection was that the instruction took in elements of damage improper to be considered by the jury because the court told "the jury that the widow and infant children of decedent" were "entitled to larger damages than would be the case of persons suing who were more distantly related." It was not pointed out, therefore, that the court was wrong in its generality on account of exceptional instances which were left to the jury to imagine, but universally wrong. In other words, the objection was not, as it now is, that the court committed the case to the imagination of the jury or made the "relationship

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itself" of the plaintiff and her children to the deceased a factor to be considered in fixing the amount of pecuniary damages. If the objection had been so special and explicit it might have been yielded to. At any rate, it was wrong because of its generality and should not now be regarded. The judgment, therefore, should be affirmed.

I am authorized to say that Mr. JUSTICE DAY and Mr. JUSTICE HUGHES concur in this dissent.

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